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Arbitrary Withholding of Consent to Humanitarian Relief in Non-international Armed Conflict

Legal Regulations and Consequences

Vijitha Veerakatty

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Cover illustration: Syria – Conflict. Opposition forces (R) escort a convoy of aid vehicles heading to the government-held Shiite towns of Fuaa and Kafraya in Syria's northwestern Idlib province, on April 30, 2016. Humanitarian convoys carrying food and medicine entered the besieged rebel-held towns of Madaya and Zabadani, northwest of Damascus, the Red Cross said. At the same time, trucks entered the besieged government-held towns of Fuaa and Kafraya, southwest of Aleppo. Omar Haj Kadour / AFP.

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I dedicate this book to all civilians who depend on humanitarian assistance in armed conflicts and who suffer the consequences of arbitrary withholding of consent to humanitarian relief. I hope that the considerations and reasoning in this book will help to improve their situation in the future.

• • •

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Abbreviations

ACHR	American Convention on Human Rights
AfCHPR	African Charta on Human and Peoples' Rights
ALNAP	Active Learning Network for Accountability and Performance
AP	Additional Protocol
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977
ASP	Assembly of State Parties to the Rome Statute of the International Criminal Court
CAT	UN Committee against Torture
CAVV	Advisory Committee on Issues of Public International Law (Netherlands)
CCW	Convention on Certain Conventional Weapons
CCHN	Centre of Competence on Humanitarian Negotiation
Common Article 1	Article 1 common to the four Geneva Conventions of 1949
Common Article 3	Article 3 common to the four Geneva Conventions of 1949
CRC	Convention on the Rights of the Child
ECHO	European Civil Protection and Humanitarian Aid Operations
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
f.	and the following page, article, or line
ff.	and the following pages, articles, or lines
fn	Footnote
GA	General Assembly
GC (I–IV)	Geneva Conventions of 12 August 1949, I: for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; II: for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; III: relative to the Treatment of Prisoners of War; IV: relative to the Protection of Civilian Persons in Time of War.
GSDRC	Governance – Social Development – Humanitarian Conflict
HRW	Human Rights Watch
ICC	International Criminal Court

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFRC	International Federation of Red Cross and Red Crescent Societies
IHFFC	International Humanitarian Fact-Finding Commission
IHL	International humanitarian law
IHRL	International human rights law
ILC	International Law Commission
MoU	Memorandum of Understanding
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
OCHA	UN Office for the Coordination of Humanitarian Affairs
OHCHR	UN Office of the High Commissioner for Human Rights
p.	page
para.	Paragraphe
paras.	Paragraphs
PCIJ	Permanent Court of International Justice
pp.	Pages
Rome Statute	Rome Statute of the International Criminal Court, of 17 July 1998
RULAC	The Rule of Law in Armed Conflict Online Portal (RULAC) of the Geneva Academy of International Humanitarian Law and Human Rights
R2P	Responsibility to Protect
SC	UN Security Council
SHA	Swiss Humanitarian Aid Unit
SLM	Sudan Liberation Movement
UK	United Kingdom
UN	United Nations Organisation
UN Charter	Charter of the United Nations, of 26 June 1945
UNOSOM	United Nations Operations in Somalia
US	United States
USAID	US Agency for International Development
VCLT	Vienna Convention on the Law of Treaties, of 23 May 1969
WASH	Water, sanitation, and hygiene

Introduction

> The targeting of civilians is against international law. But it goes further than that. We have a moral responsibility to raise our voices and make our views known – that civilians must be protected.
>
> VALERIE AMOS

1 Current Situation

Today, nearly 303 million people worldwide are in need of humanitarian assistance, most of them affected by armed conflict.[1] Rapid and timely delivery of humanitarian relief is therefore essential for the effective protection of civilians in situations of armed conflict. Tragically, it is also today's reality that international humanitarian relief is frequently impeded during armed conflicts by the parties to the conflict. The impediment of relief actions is not a recent phenomenon; it has always existed during armed conflicts as a method of warfare. However, in the past, most conflicts have been international in nature, and relief has been impeded by blockades or attacks on aid convoys in order to harm the civilian population of another State and force the opposing State to surrender. Today, by contrast, the predominant type of armed conflict is the non-international conflict that is fought between the armed forces of a State and non-State armed groups and/or between non-State armed groups.[2] Obstruction of relief is nowadays often perpetrated by the parties to the conflict by simply withholding their consent to international relief actions as a deliberate policy to target their 'own' civilian population.[3] The reasons for this can be various: The government of the affected State may,

1 UN OCHA, Global Humanitarian Overview 2024, current data available at https://humanitarianaction.info (last visited 31 March 2024).

2 The Rule of Law in Armed Conflict Online Portal (RULAC) of the Geneva Academy of International Humanitarian Law and Human Rights classifies all situations of armed violence that amount to an armed conflict under international humanitarian law. It currently monitors more than 110 armed conflicts. More than 80% of these are non-international armed conflicts, see https://geneva-academy.ch/galleries/today-s-armed-conflicts (last visited 31 August 2023).

3 On the overall subject, see ROTTENSTEINER, pp. 555 f.

for example, withhold consent to relief operations in areas where the opposing armed group exercises territorial control or enjoys support from the local population, in order to weaken the opponent's position. Non-State armed groups, on the other hand, may withhold consent to relief operations to demonstrate and assert their power over the civilian population, or to disrupt the delivery of relief to maintain disorder in the country.[4] Consent to humanitarian relief actions can be withheld either explicitly, by refusing to accept the assistance offered, or implicitly, for example by imposing unnecessary and unachievable conditions on humanitarian organisations.

Over the past decade, efforts to provide international relief to civilians in non-international armed conflicts have drawn increased attention to the growing problem of withholding of consent to humanitarian relief actions. In 2014, for instance, the UN Secretary-General reported that medical supplies that would have helped more than 200,000 people in hard-to-reach and besieged areas of Syria were detained by the Syrian government and convoys were not allowed to proceed.[5] Since then, situations of denial to aid have continued and intensified in Syria. The situation in north-west Syria is particularly alarming. Largely controlled by the opposing Islamist group Hayat Tahrir al-Sham, it is one of the poorest regions in the country.[6] Of the estimated 4.5 million people living in north-west Syria, some 4.1 are today in need of humanitarian assistance.[7] The earthquake that struck northern Syria in February 2023 exacerbated the situation: thousands of people lost their homes within minutes and were left homeless in freezing temperatures. Even under such precarious conditions, the delivery of aid has been hampered.[8] The UN Commission of Inquiry on the Syrian Arab Republic reported that in the immediate aftermath of the earthquake, the Syrian government took a full week to allow access for

4 Disorder and disruption of relief can serve to increase disquiet within the civilian population. Disquiet hinders economic growth, which in turn decreases the effectiveness of the government and increases dissatisfaction of the population. This will ultimately increase the susceptibility of the population to recruitment by the non-State armed group, see MacLeod, p. 11.

5 Report of the Secretary-General on Implementation of Security Council Resolution 2139, UN Doc S/2014/295 (2014), 23 April 2014, para 37.

6 The New Humanitarian, 'Northwest Syria aid likely to survive Russian threats, for now', 6 July 2023, available at https://www.thenewhumanitarian.org/analysis/2023/07/06/ northwest-syria-aid-likely-survive-russian-threats-now (last visited 31 August 2023).

7 reliefweb, Northwest Syria – Factsheet (as of 27 July 2023), available https://reliefweb.int/report/syrian-arab-republic/northwest-syria-factsheet-27-july-2023 (last visited 31 August 2023).

8 Human Rights Watch, 'Northwest Syria: Aid Delays Deadly for Quake Survivors', 15 February 2023, available at https://www.hrw.org/news/2023/02/15/northwest-syria-aid-delays-deadly-quake-survivors (last visited 31 August 2023).

life-saving cross-border aid. Both the government and the opposition Syrian National Army obstructed cross-line aid to affected communities, while Tahrir al-Sham in the north-west of Syria blocked all cross-line aid from Damascus.[9] In other countries, such as Yemen and Myanmar, the international humanitarian community faces similar challenges: With an estimated 21.6 million people in need of humanitarian assistance, Yemen faces currently one of the world's largest humanitarian crises.[10] Yet the Houthis and the Yemeni government continue to impose undue restrictions and regulations on humanitarian organisations and projects, leading to long delays. In addition, key roads in and out of Taizz, Yemen's third largest city, have been blocked by Houthi forces since 2015, preventing the city's residents from accessing essential goods, medicine and humanitarian aid.[11] In Myanmar, the humanitarian and human rights situation has deteriorated dramatically since the coup in February 2021 that brought the military to power. Addressing the Human Rights Council in July 2023, the UN High Commissioner for Human Rights, Volker Türk, said that the military in Myanmar is systematically denying humanitarian aid to millions of civilians in need. He pointed out that the obstruction of life-saving aid is deliberate and targeted, comprising a "calculated denial of fundamental rights and freedoms to large sections of the population."[12]

While actively targeting humanitarian relief operations, such as attacking aid convoys, is clearly forbidden under international humanitarian law (IHL) and international criminal law, withholding of consent to relief action is not explicitly mentioned as a prohibited act by branches of international law. This raises the question of whether it is legally permissible to withhold consent to relief operations in non-international armed conflicts when there is a humanitarian crisis, and the affected civilian population is in urgent need of assistance. Before addressing this question, it is necessary to first understand

9 OHCHR, Press Releases, 'Epicentre of Neglect: Protection of Civilians in Syria Remains an Illusion says UN Syria Commission of Inquiry', 15 March 2023, available at https://www.ohchr.org/en/press-releases/2023/03/epicentre-neglect-protection-civilians-syria-remains-illusion-says-un-syria (last visited 31 August 2023).

10 OCHA, Yemen Humanitarian Response Snapshot April 2023, published: 7 June 2023, available at https://reliefweb.int/report/yemen/yemen-humanitarian-response-snapshot-april-2023 (last visited 31 August 2023).

11 HRW, World Report 2023, Yemen: Events of 2022, available at https://www.hrw.org/world-report/2023/country-chapters/yemen (last visited 31 August 2023).

12 OHCHR, Statements and Speeches, 'Myanmar in "deadly freefall" into even deeper violence, says Türk,' 6 July 2023, available at https://www.ohchr.org/en/statements-and-speeches/2023/07/myanmar-deadly-freefall-even-deeper-violence-says-turk (last visited 31 August 2023).

the conditions under which international relief can be provided in non-international armed conflicts.

2 Conditions for Providing Humanitarian Relief

For the provision of international humanitarian relief in non-international armed conflicts, it is first and foremost required that the armed conflict has caused a situation of humanitarian crisis in the affected State, in which a great number of the civilian population suffers "undue hardship owing to a lack of the supplies essential to its survival, such as foodstuffs and medical supplies."[13]

The primary responsibility for meeting the humanitarian needs of the civilian population, as explained in more detail later, lies with the affected State and the non-State armed group under whose control they find themselves.[14] For international humanitarian relief to be provided, it is therefore further necessary that the responsible parties to the conflict are unable or unwilling to provide the required relief. If this is the case, international humanitarian actors can offer to provide humanitarian relief.[15] Since humanitarian assistance has to be provided in accordance with humanitarian principles,[16] relief providing actors have to offer to carry out relief that will be exclusively humanitarian and impartial in character and provided without any adverse distinction.[17]

Finally, based on the principles of State sovereignty and non-interference, the provision of relief is subject to the consent of the affected State on whose territory the relief is to be provided.[18] However, the legal requirements for providing humanitarian assistance in areas held by non-State armed groups are uncertain.[19] Engagement of humanitarian actors with armed groups is delicate, especially when these groups are considered terrorist groups by the international community. International law does not explicitly address the consent of non-State armed groups for the provision of humanitarian assistance. The need to obtain the consent of non-State armed groups for relief operations is therefore controversial in doctrine.[20] In practice, however, humanitarian

13 Article 18 AP II; J. LIESER, p. 16.
14 See Chapter 6 2.2. and Chapter 7 2.1.
15 AKANDE/GILLARD, Oxford Guidance, pp. 11 ff.
16 HAIDER, p. 24 f.; see also below Chapter 8 2.
17 On the whole GILLARD, p. 355.
18 See Chapter 6 2.3.
19 RYNGAERT, Humanitarian Assistance, p. 5 f.
20 See Chapter 7 2.2.

actors always seek the consent of armed groups that control or otherwise have influence over access to the areas to which aid is delivered or through which aid must transit, in order to ensure a safe and unimpeded delivery.[21]

Once consent has been given, the parties to the conflict must allow and facilitate rapid and unimpeded access for relief supplies and personnel.[22]

3 Can Consent to Relief Operations Be Withheld?

Although consent is a key element for the provision of humanitarian relief, the parties to the conflict do not enjoy an absolute and unlimited discretion to withhold consent to relief operations. It is generally agreed that consent to relief operations cannot be arbitrarily withheld where civilians are in need of essential supplies and where relief is offered in a manner that is exclusively humanitarian and impartial in nature.[23] Thus, withholding of consent to humanitarian operations is not lawful if it is done arbitrarily. It is however not settled in doctrine nor in practice when the withholding of consent to relief can be considered as arbitrary. There is also no conclusive answer as to what the consequences are if consent is withheld arbitrarily, and which remedies are available. In this context, the question is often raised whether international law allows for exceptions to the requirement of consent, and whether, relief can be provided without consent in situations where consent is arbitrarily withheld.

In 2014, in response to the Syrian government's systematic denial of humanitarian relief to north-western and north-eastern Syria, the UN Security Council authorised the delivery of cross-border humanitarian aid into Syria without requiring the consent of the Syrian government. This authorisation, granted by Resolution 2165 (2014), was the first time that the Security Council explicitly waived the consent of the affected State. Accordingly, this resolution raised hopes of a new practice by the international community in response to the arbitrary withholding of consent to humanitarian relief. However, the fact that the Security Council has not adopted similar resolutions since then, despite comparable humanitarian crises in other countries, and that the renewal of Resolution 2165 (2014) has always met with great resistance and was only possible under very difficult conditions until the Security Council finally failed to agree on a renewal in 2023, has sobered the initial hopes.[24] Doubts have arisen

21 See Chapter 1 2.3.

22 On the whole, see OCHA, Factsheet, p. 1 f.

23 Instead of many, AKANDE/GILARD, Oxford Guidance, p. 21.

24 See Chapter 18 2.2.

as to whether the Security Council will ever again be willing to waive the consent of the affected State in situations of humanitarian crisis with a resolution similar to Resolution 2165 (2014).

4 Aims of this Book

In view of the uncertainties surrounding the arbitrary withholding of consent to relief operations in situations of non-international armed conflict, this book aims to explore the following questions:

- Whose consent is required for the provision of humanitarian relief?
- When can the withholding of consent to relief operations be considered as arbitrary?
- What are the legal responsibilities for the conflict parties when they arbitrarily withhold consent to humanitarian relief?
- What remedies are available to respond to situations of arbitrary withholding of consent and can humanitarian relief be provided without consent?

A legal examination on this topic is particularly important considering the increasing number of situations in today's non-international armed conflicts in which consent to international humanitarian relief is withheld and unnecessary suffering is inflicted on the civilian population, while at the same time the rules applicable to these situations remain largely unclear.

A profound understanding of the law in this context is also important for negotiating humanitarian access with parties to a conflict. The author of this book is aware that consent for humanitarian assistance cannot be obtained by simply arguing on the basis of the law. Nonetheless, knowledge of the legal rules governing humanitarian access is crucial for defining the framework within which negotiations can take place. While legal arguments cannot stand alone, their reference can strengthen other arguments in favour of humanitarian access.[25]

Finally, the present legal examination of situations of arbitrary withholding of consent to humanitarian assistance also has a symbolic significance. As highlighted in the opening quote from Valerie Amos, former UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator: the international community has a moral responsibility to raise its voice and make its view known when civilians are targeted. Civilians can be targeted not only with weapons, but also by deprivation of humanitarian

25 Haider, p. 6.

relief which is essential to their survival. It is therefore important to recall and emphasise that the arbitrary withholding of consent to relief is not a domestic problem of the affected State, even if it occurs in non-international armed conflicts. Adequate protection of civilians during armed conflicts is a matter of concern for the international community as a whole. This book therefore aims to raise awareness of the legal problem of the arbitrary withholding of consent to relief operations in non-international armed conflicts and to serve as a source for further discussion and voice raising.

To date, a comprehensive account on the topic of arbitrary withholding of consent to humanitarian relief in armed conflicts has only been provided by the authors AKANDE and GILLARD in the Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict (hereafter referred to as the 'Oxford Guidance').[26] Accordingly, the Oxford Guidance has been an important reference and inspiration for the this book. However, in line with its aim to be a guidance for practitioners involved in humanitarian assistance, the Oxford Guidance offers only a brief overview of the legal issues surrounding the arbitrary withholding of consent. Even though it addresses many important issues, the reflections on them remain rather on the surface. Yet detailed explanations and an in-depth examination of the legal regulations and practice (including jurisdiction) are necessary for a holistic understanding of the challenges and difficulties in this area. This book will therefore address this need by dealing with the subject both extensively and with the necessary depth, thus providing an analysis of the topic that has been lacking up to now.

5 Structure of the Book

The arbitrary withholding of consent to relief operations is not an isolated legal problem, but is rather defined and shaped by the normative regulations applicable to the actors involved in relief operations. This book therefore analyses the legal problem of withholding of consent to humanitarian relief from the perspective of the five main actors involved in relief actions in non-international armed conflicts. These are, on the one hand, the parties to the conflict, namely the State affected by the conflict as well as the opposing non-State armed groups, and, on the other hand, the humanitarian actors, the non-belligerent States, and the civilian population in the affected State.

26 AKANDE/GILLARD, Oxford Guidance, for full details see bibliography.

This book is structured in five parts:

Part 1 outlines the essential elements of international humanitarian assistance in non-international armed conflicts and sets the stage for a basic understanding of the factual and normative environment in which withholding of consent to relief takes place. It provides a general overview of the actors involved in relief operations, followed by the legal framework for international humanitarian relief in non-international armed conflicts, a brief account of the concept of humanitarian relief, and concludes with the rules enabling the identification of situations of non-international armed conflict.

Part 2 takes a closer look at the relevant rights and obligations of the five main actors involved in humanitarian relief. This allows later to identify which obligations are not respected and which rights are violated when consent to relief operations is arbitrarily withheld.

Part 3 addresses the arbitrariness of withholding of consent. It discusses the legal nature of withholding consent, examines the legal basis for the prohibition of arbitrary withholding of consent, and finally shows how arbitrariness in withholding consent can be assessed.

Part 4 deals with the legal consequences of arbitrary withholding of consent for the various actors involved in humanitarian relief. The notion of consequences is defined broadly: for the parties to the conflict in terms of their responsibility for the legal violations caused by the arbitrary withholding of consent, and for the other actors in terms of possible remedies they can seek against the parties to the conflict for the arbitrary withholding of consent.

Part 5 identifies, on the basis of the previous findings, the gaps in the law that hinder an effective prevention of and response to the arbitrary withholding of consent to relief operations and discusses what legal developments are needed to fill these gaps.

The book *concludes* with a brief summary of the findings from the previous chapters and a general concluding remark on the topic.

Since the day-to-day reality of providing humanitarian relief is influenced by practical circumstances and customs, the author of this book has had various discussions and exchanges with various people working in the field of humanitarian relief. This has provided the author with a certain background understanding of how the normative rules are applied in practice and what the challenges are. Discussions with practitioners also helped the author to maintain a realistic perspective on the demands for development of the law, which are formulated in Part 5 of the book. Thus, where this book refers to opinions or challenges in practice, unless otherwise indicated, the sources are these discussions with practitioners, namely with:

- *Martin Gottwald*. Position at the time: Chief of the Emergency Policy and Capacity Development Section, Division of Emergency, Security and Supply at UNHCR – The UN Refugee Agency. Discussion was held on 30 June 2017.
- *Simon Bagshaw*. Position at the time: Senior Policy Advisor on the protection of civilians in armed conflict at United Nations Office for the Coordination of Humanitarian Affairs (OCHA). Discussion was held on 24 July 2017.
- *Emanuela Gillard*. Position at the time: Senior Research Fellow at the Oxford Institute for Ethics, Law and Armed Conflict, University of Oxford, discussion held on 13 September 2017.
- *Cyrill Troxler.* Position at the time: Delegate for Economic Security at the International Committee of the Red Cross (ICRC). Discussions were held on 4 October 2017 and 16 February 2020.
- *Rochus Peyer*. Position at the time: Legal Officer at the Directorate of International Law of the Swiss Federal Department of Foreign Affairs (SFDA). Discussion was held on 23 January 2018.
- *Carla Ruta.* Position at the time: Thematic Legal Advisor at Geneva Call. Discussion was held on 6 April 2018.
- *David Lanz.* Position at the time: Co-Head of the Mediation Program at swisspeace. Duscussion was held on 8 January 2020.

Finally, it should be noted that this book does not provide any case analyses of specific non-international armed conflicts. However, some situations of past or ongoing armed conflicts are mentioned as examples for illustrative purposes. But the scope of this book has not allowed for a more in-depth look at the details of these conflicts.

PART 1

International Humanitarian Relief in Non-international Armed Conflicts

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CHAPTER 1

Actors Involved in Relief Actions

The actors involved in international humanitarian operations in non-international armed conflicts are numerous and diverse. This book focuses on the five main actors, namely the affected State (1), non-State armed groups (2), humanitarian actors (3), non-belligerent States (4) and civilians (5). In this context, it is important to note that third States can play different roles with regard to relief operations in non-international armed conflicts. They can act both as humanitarian actors and as part of the non-belligerent international community. This difference in roles will be reflected in the following by referring to them as "third States" in their role as humanitarian actors and as "non-belligerent States" in their role as non-belligerent countries.

It should be further noted that the aforementioned five main actors are involved in the delivery of relief in one way or another. There are, of course, other important actors (e.g. Geneva Call or bodies of international organisations such as the UN General Assembly or the UN Security Council) that are not directly involved in the aid process but are relevant for the implementation and enforcement of relevant international law. Their role will therefore be specifically addressed in the context of the respective topics.

1 Affected State

The affected State is the one that is concerned by a non-international armed conflict and on whose territory the humanitarian assistance is to be provided. A State is considered to be affected by a non-international armed conflict if the fighting between the parties to the conflict is taking place on its territory. For this purpose, the geographical location of the non-State armed group that is a party to the non-international armed conflict is irrelevant. In other words, it is not necessary that the armed group involved in the non-international armed conflict is also located on the territory of the affected State. In practice, non-State armed groups are often situated at the border regions of neighbouring States.[1]

1 Sivakumaran, Non-International Armed Conflict, p. 229 f.; See Chapter 4 3.

International law does not specify which body within a State is responsible for responding to offers of humanitarian assistance. It is the national law of the State that determines the responsible body. Since the acceptance of a relief operation expresses the will of the State as a whole, humanitarian actors usually negotiate with organs of the central government of the State, such as the Minister of Foreign Affairs. The modalities of the operation are then discussed at the regional level with representatives of local administrations. The implementation of the decision to allow or deny access to relief organisations is carried out on the ground by the State's security or military forces.[2]

2 Non-state Armed Groups

2.1 *Characteristics*

Non-State armed groups designate the non-State party in an armed conflict.[3] Today, there are hundreds, if not thousands, of armed groups involved in armed conflict around the world.[4] The large number of non-State armed groups in today's conflicts highlights the need for humanitarian actors to engage not only with the affected State, but also with these groups in order to enable the safe and effective delivery of humanitarian assistance to civilians.[5] Armed groups often live among civilians. This leads to a mixing of battle zones and residential areas, making the traditional distinction between combatants and civilians increasingly difficult.[6]

Non-State armed groups can be found in both types of armed conflict, international and non-international. While in international armed conflicts armed groups act as national movements against external occupation, in non-international armed conflicts armed groups fight either against their own government or against other armed groups. The distinction between non-State armed groups in international and non-international armed conflicts is discussed in more detail later in this book.[7]

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2 Akande/Gillard, Oxford Guidance, p. 19 and discussions with practitioners.

3 Sivakumaran, Non-International Armed Conflict, p. 3.

4 These figures do not differentiate between non-State armed groups as defined in IHL and others, see ICRC, International Humanitarian Law, p. 50 with further references.

5 Schottler/ Hoffmann, p. 396.

6 For example, Boko Haram lives in captured villages in Nigeria, various living regions of Syria and Iraq are taken by ISIS, and the Taliban or Al-Qaeda are considered as part of the community in Pakistan and Afghanistan, see MacLeod, p. 7 ff.

7 See Chapter 4 3.1.

2.2 *Definition*

The sheer number of different non-State armed groups in size, structure, and capabilities makes a general and conclusive definition of armed groups difficult.

The International Council on Human Rights Policy (ICHRP) defined armed groups very broadly as groups which are "armed and use force to achieve their objectives and are not under State control" and which differ from other groups by not pursuing a private agenda, but having political and/or economic objectives.[8] A similar definition can also be found in the doctrine, which adds military and religious objectives as possible goals of such groups.[9] This definition includes rebel opposition groups, liberation movements and *de facto* authorities or regimes which may exercise effective control over some parts of the territory of the affected State, but excludes criminal gangs or any armed groups without an objective in the before mentioned sense.[10]

According to the International Committee of the Red Cross (ICRC)

> organized armed groups belonging to a non-State party to an armed conflict include both, dissident armed forces and other organized armed groups. Dissident armed forces essentially constitute part of a State's armed forces that have turned against the government. Other organized armed groups recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity, and level of sophistication as armed forces.[11]

In summary, the constitutive elements of non-State armed groups are that they are not part of the government armed forces and that they use armed violence to achieve their objectives, which may be political, economic, religious and/or military. They also require a sufficient level of organisational structure to conduct hostilities as a party to a non-international armed conflict.[12] The organisational structure of an armed group is the most important element in qualifying an armed group as a party to a conflict. This requirement will therefore be considered in more detail later in the discussion of parties to a non-international armed conflict.[13]

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8 ICHRP, p. 5.

9 For example, BELLAL/GIACCA/CASEY-MASLEN, p. 48.

10 On the overall topic, see BELLAL, Direct Responsibility, p. 306; HOFMANN, p. 396.

11 ICRC, Direct Participation in Hostilities, p. 31 f.

12 See also HEFFES/FRENKEL, p. 45.

13 See Chapter 4 2.2.

2.3 *With and without Territorial Control*

In practice, the consent of armed groups is sought by humanitarian actors primarily not out of a sense of legal obligation, but in order to provide safe and unhindered assistance. Consent is therefore sought in particular from armed groups that exercise territorial control over the area in which the assistance is to be provided or through which it is to transit. According to AP II, in situations of non-international armed conflict, an area is considered to be under the territorial control of an armed group if they "exercise such control over a part of" the territory of the affected State's as they are able "to carry out sustained and concerted military operations".[14] According to the ICRC's Commentary to AP II, this requires that an armed group has a dominant presence with a degree of stability in an area that has escaped the control of government forces, such that it is capable of carrying out continuous and intensive military operations in that particular area.[15]

However, in situations where an area is highly contested and involves many armed groups (which is the case in many non-international armed conflicts),[16] territorial control can change hands rapidly and it is difficult (particularly in terms of elements such as stability and continuity) to determine which group has territorial control when.[17] In addition, the provision of relief can also be persistently obstructed by armed groups that do not (or do not yet) have territorial control, but are otherwise well established and present in the areas where relief is to be provided. In order to provide safe and unhindered assistance, humanitarian actors therefore, in practice, engage with all relevant armed groups and seek their consent: those who have control and those who otherwise have influence over access to areas where assistance is to be provided or through which it is to transit.[18] This book therefore discusses both armed groups with and without territorial control as potential parties to the conflict who may withhold consent to relief operations.

This is a different approach from the one generally taken in doctrine, where only armed groups with territorial control are mentioned in terms of consent to humanitarian relief.[19] However, the author of this book came to this

14 Article 1 AP II.

15 ICRC, Commentary on the APs, para. 4467 ff.

16 ICRC, Commentary on the APs, para. 4467.

17 "An armed group's control of territory can be fluid and will vary as the conflict progresses from day to day and week to week," FORTIN, p. 203.

18 Discussions with practitioners, particularly with Cyrill Troxler, February 2020.

19 For example, MACLEOD agrees on engagement with both types of armed groups, but for seeking acceptance for the provision of relief he only refers to armed groups with territorial control, see p. 6 f.

conclusion after several discussions with practitioners who confirmed that, where other armed groups are considered to have influence over access to civilians, humanitarian actors not only inform them of the forthcoming provision of relief, but also seek their consent to the provision of relief as such. It therefore seems to the author to be more in line with practice to include both types of armed groups in the discussion of withholding consent to relief operations.

2.4 *Responsible Organ or Functionary*

As the internal structure of each non-State armed group may vary,[20] it is difficult to say which body or functionary within an armed group may be responsible for giving consent to relief. Since consent to relief is taken as a decision for the group as a whole (similar to States), it is important that the particular member of the group involved in the negotiations has the necessary decision-making authority. The decision to give or withhold consent to relief is therefore most likely to be taken at a higher hierarchical level, such as that of the commander. Ordinary members and fighters of the armed group will be in charge of implementing this decision on the ground by refusing aid convoys at checkpoints.[21]

3 Humanitarian Actors

3.1 *In General*

Common Article 3 of the GCs states, with regard to humanitarian assistance in non-international armed conflicts, that "[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict." This gives the ICRC a specific mandate to take the humanitarian initiative in non-international armed conflicts. However, the explicit mention of the ICRC does not exclude other humanitarian actors from providing assistance in non-international armed conflicts.[22] Article 18(2) of AP II provides that relief activities shall be exclusively humanitarian, impartial and carried out without any adverse distinction. Thus, in order to act as a humanitarian actor in a non-international armed conflict, it is necessary that those seeking to provide assistance are willing to act in accordance with the humanitarian principles set out in Article 18(2) of AP II.[23]

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20 BELLAL, Direct Responsibility, p. 306 with further references.

21 Discussion with practitioners.

22 SIVAKUMARAN, Non-International Armed Conflict, p. 469.

23 On the overall topic, see AKANDE/GILLARD, Oxford Guidance, pp. 14 and p. 19.

Since the end of the Cold War, the variety and number of humanitarian actors has increased considerably.[24] Today, there are over 4000 national and international humanitarian organisations around the world.[25] From a legal perspective, international humanitarian actors can be divided into three types of actors: first, those that are recognised as subjects of international law, such as third States and international relief organisations. Second, private actors, such as NGOs, which are not subject to international law. Thirdly and finally, the ICRC, which occupies a unique position in the classification, since it is formally an NGO but enjoys a legal status equivalent to that of international organisations.[26] The approach of the respective humanitarian actors to the humanitarian principles can differ according to their nature, which will be discussed in detail later.[27] There are, however, various forms of cooperation and collaboration between the different humanitarian actors, so that, despite or because of these differences, a comprehensive and effective humanitarian response is possible.[28] The following section will shortly outline the characteristics of the different humanitarian actors.

3.2 *Types of Humanitarian Actors*

3.2.1 Third States

Throughout the history of humanitarian relief, third States have always been engaged in situations of humanitarian crisis in other countries.[29] They act in general through national governmental relief organisations which they mandate with international activities. The Swiss Humanitarian Aid Unit (SHA), for example, is the operational arm of Switzerland's humanitarian engagement.[30] The humanitarian activities of the US government are managed by USAID, which has been mandated by the US State Department since 1961 to provide humanitarian aid abroad.[31]

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24 HAIDER, p. 24; HEINTZE/ZWITTER, p. 1.

25 Estimated number of humanitarian actors is 4'480, see, ALNAP, The State of the Humanitarian Systeme (SOHS), 2018 Edition, available at https://sohs.alnap.org/help-library/the-state-of-the-humanitarian-system-2018-full-report (last visited 31 August 2023).

26 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 21; AKANDE/GILLARD, Oxford Guidance, p. 10.

27 See Chapter 2 VII.

28 BRYCE, p. 2.

29 See Chapter 3 1.

30 See the website of the Swiss Federal Council on SHA, available at https://www.eda.admin.ch/deza/en/home/activities-projects/activities/humanitarian-aid/swiss-humanitarian-aid-unit.html (last visited 31 August 2023).

31 See the website of the USAID, available at https://www.usaid.gov (last visited 31 August 2023).

3.2.2 International Relief Organisations

International organisations are entities that are governed by State Parties.[32] Prominent international humanitarian organisations are, for example, entities of the United Nations (UN), such as the UN High Commissioner for Refugees (UNHCR), the UN Children's Fund (UNICEF) and the UN Development Programme (UNDP). Pursuant to Resolution 46/182 of the UN General Assembly, the UN Office for the Coordination of Humanitarian Affairs (OCHA) coordinates the humanitarian response of the different UN entities and cooperating partners.[33] There are also intergovernmental humanitarian organisations at regional level, such as the European Civil Protection and Humanitarian Aid Operations Department of the European Commission (ECHO, previously the European Community Humanitarian Office), which provide assistance and coordination services in situations of humanitarian crises, whether caused by armed conflicts or natural or man-made disasters.[34] As intergovernmental bodies, international humanitarian organisations require the consent of member States in order to operate, which may make it difficult for such organisations to operate in politically charged situations or where non-State armed groups control or influence access to the territory.[35]

3.2.3 Non-governmental Relief Organisations

Non-governmental organisations (NGOs) are non-profit associations established by private individuals. NGOs often have the possibility to acquire legal personality under national law. However, as private actors, they do not have legal personality under international law.[36] NGOs play an important role in the humanitarian field. As they are neither a State nor an inter-State organisation, they are able to act independently of any governmental or political interests.[37]

Médecins sans Frontières (MSF) is one of the most active and well established non-governmental humanitarian organisations. MSF was founded in 1971 by a small group of doctors and journalists who split from the ICRC. The founder of MSF did not agree with the ICRC working policies of absolute discretion. According to MSF, acting in the interests of the victims also requires the possibility to openly criticise the conflict parties and to adopt a

32 DEBUF, p. 322.
33 UN GA, Resolution 46/182.
34 See webseit of ECPHAO, available at https://ec.europa.eu/info/departments/humanitarian-aid-and-civil-protection_en (last visited 31 August 2023).
35 With regard to UN entities, SAUL, p. 48.
36 Instead of many, see CHRANOVITZ, pp. 350 and 355.
37 RYFMAN, pp. 28 and 45.

clear position.[38] The offensive working policy of MSF and the will to openly speak about grave human rights breaches is controversial and clashes with the general understanding of the humanitarian principle of neutrality.[39] This book will therefore discuss later the working methods of the MSF in detail.[40] Other known non-governmental relief organisations are the Oxford Committee for Famine Relief (Oxfam), Save the Children Fund (SCF) and Action contre la Faim (ACF).

3.2.4 The International Committee of the Red Cross (ICRC)

The ICRC was founded by Henry Dunant in 1863. With his book "Memory of Solferino", Dunant set a milestone in the history of humanitarian aid by calling for the separation of politics from aid and proposing an independent, permanent aid organisation to care for the wounded in times of war, which eventually led to the creation of the ICRC.[41] The ICRC defines its mission as the protection of victims of armed conflicts and other situations of violence[42] and the provision of humanitarian assistance to them. It also seeks to promote respect for IHL and to provide training in IHL for States and non-State armed groups. Another important part of the ICRC's work involves visits to detainees in situations of armed conflict and violence, with the aim of preventing violations of the law during detention, such as inhuman treatment or torture.[43] Together with the International Federation of Red Cross and Red Crescent Societies (IFRC), and the 188 national Red Cross and Red Crescent Societies, the ICRC forms the international Red Cross and Red Crescent Movement.[44]

By explicitly mentioning the ICRC in the Geneva Conventions, the States Parties to the Convention have given the ICRC a specific legal mandate to act in armed conflicts and to provide humanitarian assistance. The ICRC is also mandated to contribute to the development of international humanitarian law and has played a particularly important role in the development of IHL applicable to non-international armed conflicts.[45] The ICRC's Study on customary IHL,

38 Lieser, p. 18.

39 Von Pilar, p. 39.

40 See Chapter 2 VII.

41 Von Pilar, p. 34; Haug, p. 25 f.

42 This enables the ICRC to act also in situations where the threshold of an armed conflict is not yet reached or denied by the respective parties, see Sivakumaran, Non-International Armed Conflict, p. 470 with further references.

43 Sivakumaran, Non-International Armed conflict, p. 67 ff and 471.

44 On the ICRC's mandate, mission and the international Red Cross and Red Crescent Movement, see ICRC's website, available at https://www.icrc.org/en/mandate-and-mission (last visited, 31 August 2023).

45 Article 4(1)(g) and 5(3) Statutes of the International Committee of the Red Cross.

which will be discussed later, is an example of an important contribution of the ICRC in this context.[46] The ICRC enjoys the privileges and immunities necessary to carry out its mandate effectively and has an international legal personality, which distinguishes it from NGOs. The ICRC's legal status thus corresponds to that of an international organisation.[47]

The ICRC is guided in its work by humanitarian principles and ensures absolute discretion and confidentiality as part of its working policy in order to fulfil its humanitarian mandate.[48] Even though other humanitarian actors are also entitled to provide relief during non-international armed conflicts, in practice the ICRC nevertheless remains the most important and trusted humanitarian actor.[49]

4 Non-belligerent States

'Non-belligerent States' is not an official term in international law. It is used in practice to describe those States of the international community which are not engaged in the fighting of a given armed conflict. This does not mean, however, that they cannot be involved in the conflict in other ways. In particular, the neighbouring countries of an affected State often have their own interests in an ongoing conflict. It is therefore common in practice, that neighbouring non-belligerent States may be involved in a non-international armed conflict through financial or other support to one of the parties to the conflict, without becoming a party to the conflict themselves.[50] It is important to note that non-belligerent States are not the same as neutral States which have complete impartiality towards belligerents.[51] How non-belligerent States can be (directly

46 SIVAKUMARAN, Non-International Armed conflict, p. 468.

47 DELOUF, pp. 320 and 324; see also LIESER, pp. 20 and 35.

48 Beside the general humanitarian principles, the ICRC has defined in its statutes own fundamental principles for the International Red Cross and Red Crescent Movement, which include beside the humanitarian principles like humanity, impartiality, neutrality and indendence, also voluntary service, unity, and universality, see Article 4(1(a)) of the Statutes of the International Committee of the Red Cross; hereto SIVAKUMARAN, Non-International Armed conflict, p. 471.

49 SIVAKUMARAN, Non-International Armed conflict, p. 469.

50 Definition of non-belligerent states on the website of the union legal network, available at http://unionlegalnetwork.com/post/720844560 57/non-belligerent-states (last visited 31 August 2023).

51 SPRING, p. 34 f.

or indirectly) involved in non-international armed conflicts will be outlined in detail later.[52]

5 Civilians

The term of "civilians" is defined for international armed conflicts roughly in Article 4 GC IV and Article 50(1) of AP I as all persons not belonging to the armed forces.[53] There is no similar definition of civilians in treaty law for situations of non-international armed conflict.[54] However, since, according to Article 1 of AP II, parties to a non-international armed conflict are "armed forces and dissident armed forces or other organized armed groups", it can be concluded that civilians in non-international armed conflicts are all persons who are not members of such forces or groups.[55] It should also be noted that, according to Article 13(3) of AP II, civilians lose their protection if they actively participate in hostilities.[56] Thus, in order to enjoy the protection based on the status of a civilian, it is further required that there is no participation in hostilities as so called "irregular combatants."[57]

The category of civilians must be distinguished from the persons *hors de combat*. According to Article 41 AP I (which is also applied as a rule of customary law in non-international armed conflicts) persons *hors de combat* are members of an armed force who do not engage in hostilities because they "are in the power of an adverse Party" or "clearly express an intention to surrender" or "have been rendered unconscious or are otherwise incapacitated by wounds or sickness, and therefore are incapable of defencing themselves." Even though persons *hors de combat* enjoy similar protection as civilians under Common Article 3 of the GCs and AP II, they are not part of the civilian population.[58]

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52 See Chapter 4 3.3.

53 HAIDER, p. 17.

54 There was a definition in the draft of AP II saying that "a civilian is anyone who is not a member of the armed forces or of an organized armed group", but this was finally dropped at the conference to adopt a more simplified text, see ICRC, Study on Customary Law, Rule 5.

55 There are other treaties to non-international armed conflicts which have used a similar definition of civilians are e.g., Amended Protocol II to the CCW, Article 3(7)-(11); Protocol III to the CCW, Article 2; ICC Statute, Article 8(2)(e)(i), (iii) and (viii); on the overall topic, see ICRC, Study on Customary Law, Rule 5.

56 According to Article 13(3) Additional Protocol II, civilians are immune from direct attack "unless and for such time as they take a direct part in hostilities"; on the overall topic, see ICRC, Customary Law Study, Rule 5, p.

57 KOLB/HYDE, p. 223.

58 On the overall topic, see ICRC, Study on Customary Law, Rule 47.

CHAPTER 2

Legal Framework

Since international humanitarian relief can take place in different contexts, such as during armed conflicts or in the aftermath to a natural or man-made disasters,[1] there are several regulations which are applicable to provision of relief operations.[2] The actors involved have different rights and duties, particularly concerning the acceptance of humanitarian assistance, depending on the circumstances in which relief is provided.[3] The purpose of this chapter is to identify the various regulations which are relevant to humanitarian relief in situations of non-international armed conflict.[4] The applicable rules are outlined here only in broad terms; the specific content of when, and how humanitarian assistance can be provided and the rights and obligations of the various actors involved, will be presented and discussed in detail later. The focus of this book is on international and certain regional regulations. National laws are not discussed, as this would go beyond the scope of this book. It should be noted, however, that international law sets the minimum standard for the regulation of humanitarian assistance. Thus, national law can go beyond international requirements, but cannot undermine them.[5]

1 Overview

Humanitarian relief in non-international armed conflicts is regulated by provisions of different branches of international law.[6] First of all, principles

1 Haider, p. 6.

2 Haider, p. 37.

3 There are certain voices in the doctrine which are claiming for an overarching protection and not to differentiate the applicable law according to the specific circumstance, as the needs of the affected people remain the same regardless of whether there is an armed conflict or a natural disaster, see for example Kuijt, p. 55 f. On the other side, there are also opinions that substantial differences between the two situations justify different regulations. For example, security is an overwhelming concern in armed conflicts, as conflict parties are worried that international humanitarian actors could favour the opposing party. The legal regulation concerning armed conflict therefore has, in contrast to situations of disaster, also to deal with relief within the legitimate interests of the conflict parties; see Fisher, p. 446.

4 Haider, p. 6.

5 On the overall topic, see sfdfa, Normative Framework, p. 11.

6 Kuijt, p. 57; Haider, pp. 6, 14 and 19.

of general international law, such as the principles of state sovereignty and non-intervention, define the framework within which humanitarian relief can take place on the territory of the affected State (2.1).[7] International humanitarian law (IHL) contains the majority of the legal provisions relevant to humanitarian assistance in non-international armed conflicts and is accordingly the most important legal regime in this context (2.2).[8] Relevant are also the humanitarian principles. They provide general guidelines for the work of humanitarian actors, whether in situations of disaster or armed conflict.[9] Although the humanitarian principles do not constitute legal obligations, they are binding on humanitarian actors to the extent that international law (including international humanitarian law) requires their compliance for the provision of humanitarian assistance. Their respect is consequently a necessary condition for obtaining consent to provide humanitarian relief.[10] They are therefore as important as legally binding norms for humanitarian assistance in non-international armed conflicts and must be considered within the relevant normative framework (2.3).

Further, international human rights law (IHRL) provides (complementary to IHL) human rights provisions that must be respected and protected in situations of humanitarian crisis (2.4).[11] Finally, together with IHL and IHRL, the provisions of international criminal law are particularly important for assessing when the withholding of consent to relief actions may constitute arbitrariness (2.5)

2 Relevant Laws and Principles

2.1 *The Principles of State Sovereignty and Non-interference*

Sovereignty confers on a State exclusive and supreme authority over its territory and internal affairs.[12] As a result, international law requires that no other State or international organisation shall interfere, directly or indirectly, in the internal affairs of a State if such interference threatens the sovereignty of that State.[13] That the sovereignty of the State should not be affected is also explicitly

7 KUIJT, p. 57.
8 HAIDER, p. 6.
9 Instead of many, see OCHA on Message, Humanitarian Principles, p. 1.
10 HAIDER, p. 24, OCHA on Message, Humanitarian Principles, p. 1, see also conditions for providing relief explained in detail later Chapter 8 1.
11 HAIDER, p. 6.
12 Instead of many, see KÄLIN/EPINEY/CARONI/KÜNZLI, p. 153.
13 Instead of many, see FORD, p. 7; SFDFA, Normative Framework p. 16.

mentioned in Article 3 AP II for situations of non-international armed conflict.[14] However, it needs to be noted that the sovereignty of the State not only provides it with the right of non-intervention, but also (according to contemporary understanding) with responsibilities and obligations towards its own civilian population, especially in the context of humanitarian assistance,[15] as will be outlined hereinafter in relation to the obligations of the affected State.[16]

2.2 *International Humanitarian Law (IHL)*

Based on its general aim to limit the effects of armed conflict and to protect persons who are not participating in hostilities, IHL provides rules on humanitarian assistance and access to people affected by armed conflict.[17] As the legal rules for humanitarian assistance were first developed in the context of armed conflict, IHL contains – compared to other branches of international law – the widest range of provisions for humanitarian relief.[18]

In treaty law, the Fourth Geneva Convention (GC IV) of 1949[19] and the two Additional Protocols (AP I–II) of 1977[20] are the most important sources for humanitarian relief during armed conflicts (1.1.).[21] Relevant for situations of non-international armed conflict are particularly Common Article 3 to the GCs and Article 18 of AP II. Besides, customary humanitarian law has a significant role in the provision of humanitarian relief during non-international armed conflicts (1.2.). Finally, the fundamental principles of IHL (which should not be confused with the humanitarian principles) must be mentioned in this

14 Article 3(1) AP II: "Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State."

15 KUIJT, p. 57.

16 See Chapter 6 2.

17 SFDFA, Normative Framework, p. 23 f.; VON PILAR, p. 35; HAIDER, p. 13.

18 AKANDE/GILLARD, Oxford Guidance, p. 9; SPIEKER, p. 7.

19 Geneva Convention relative to the Protection relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

20 Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.

21 The Hague Conventions of 1899 and 1907, in contrast, mainly concern restrictions on the means and methods of warfare and are less relevant in matters of humanitarian relief. For example, Article 14 of the Hague Convention is one of the few relevant provisions on relief; for more information, see HAIDER, p. 25.

context, as they have to be respected throughout the application of all IHL rules, whether they are based on treaty or customary law (1.3.).

2.2.1 Geneva Conventions and Additional Protocols

Rules on humanitarian relief are generally laid down in GC IV and in AP I and II, which complement and strengthen each other in the protection of the civilian population.[22] The applicable regulations depend on the situation in which humanitarian operations are conducted, whether during international, including situations of occupation, or non-international conflicts.[23] While GC IV and AP I contain provisions on humanitarian relief in international armed conflicts,[24] which are mainly found in Articles 17, 23 and 55 of the GC IV and Articles 54 and 69-71 of AP I, for situations of non-international armed conflict only Common Article 3 of the GCs and AP II, in particular Article 18 of AP II, are relevant. The treaty law regime for humanitarian assistance in non-international armed conflicts is therefore weaker than the one for international conflicts.[25] This seems incomprehensible when one considers that humanitarian assistance in armed conflicts faces the same challenges regardless of whether the conflict is international or non-international. Indeed, this distinction is based on the traditional understanding of States that non-international armed conflicts are more of an internal affair of a State, which should be less subject to external intervention. However, this understanding has changed and today there is now a consensus that the core provisions of armed conflict should also apply to non-international conflicts. Accordingly, international practice has shown that many of the obligations established as rules for international conflicts have become customary law and therefore apply as such in non-international armed conflicts.[26] Customary international humanitarian law has therefore become particularly important for humanitarian relief in non-international armed conflicts.

2.2.2 Customary Law

The ICRC undertook an extensive study of State practice and opinio juris to identify rules of customary international humanitarian law (hereafter referred to as the ICRC Study on Customary Law). The study was carried out by the ICRC in response to a mandate from the International Conference of the Red

22 SFDFA, Normative Framework, p. 16.
23 AKANDE/GILLARD, Oxford Guidance, p. 9.
24 HAIDER, p. 17.
25 SPIEKER, p. 15.
26 SIVAKUMARAN, Non-International Armed Conflict, p. 468 f.

Cross and Red Crescent and was undertaken in particular to fill the gap in the conventional rules of IHL relating to non-international armed conflicts.[27] The Study finds that in recent years the law of non-international armed conflicts has moved closer to the law of international armed conflicts through the jurisprudence of international courts and tribunals, new treaties and the growing influence of international human rights law. It concludes that 136 (and arguably even 141) of the 161 identified rules of customary humanitarian law apply equally to both types of armed conflict. The study shows that many of the customary rules run parallel to the provisions of the treaties, which is particularly important for the provisions of APs I and II, which, unlike the GCs, are not universally ratified. It further notes that even rules originally designed to apply only in international conflicts are applied as customary rules in non-international armed conflicts.[28] The ICRC Study shows that treaty provisions on relief operations are also mirrored in customary law and are essentially identical in both types of conflict.[29] Rules on relief provisions considered to be customary are, for example, those set out in Articles 13 to 18 AP II.[30]

2.2.3 Fundamental Principles of IHL

The fundamental principles of IHL form the basis of all humanitarian rules in treaty and customary law. They have been recognised throughout the history of humanitarian law and are explicitly mentioned in some treaties but can also be derived from the substance and meaning of existing rules and have been recognised by the ICRC as established norms of customary international law.[31] They are therefore particularly relevant to the interpretation and application of humanitarian rules in both international and non-international armed conflicts.[32]

The focus of the fundamental principles is on the protection of civilians and civilian objects, which in the context of humanitarian assistance includes humanitarian actors and relief objects.[33] The fundamental principles must be

27 SIVAKUMARAN, Non-International Armed Conflict, p. 468 f.

28 HAIDER, p. 15; SFDFA, Normative Framework, p. 23; ICRC, Study on Customary Law, Rule 55.

29 ICRC's website on its Study on Customary Law: questions & answers, available at https://www.icrc.org/en/doc/resources/documents/misc/customary-law-q-and-a-150805.htm (last visited 31 August 2023).

30 HENCKAERTS, p. 188.

31 HAIDER, p. 17.

32 ICRC, Casebook Fundamental Principles of IHL, available at casebook.icrc.org/law/fundamentals-ihl (last visited 31 August 2023); see also GILL, p. 40.

33 See Chapter 8 2.2. and Chapter 10 1.

respected by the parties to a conflict, but also by humanitarian actors when carrying out relief operations. The fundamental principles are therefore also reflected in the humanitarian principles.[34]

There are four fundamental principles: first and foremost, the *principle of distinction*, which requires to distinguish between combatants and military objectives on the one hand and civilians and civilian objects on the other. Only the latter category of persons and objects is protected under IHL.[35] Further, there is the *principle of necessity and proportionality*. This principle demands that only the necessary amount and type of force should be used. For example, no militarily motivated action by parties to a conflict should cause loss or suffering to civilians that is considered excessive in relation to the direct military advantage expected.[36] Another fundamental principle is the *principle of humane treatment,* which requires that civilians are always treated humanely. This includes, in particular, the obligation not to intentionally place civilian populations in situations where their lives or dignity are threatened.[37] Finally, the *principle of non-discrimination* stipulates that all protected persons shall be treated with equal consideration and that all persons affected by armed conflict shall be entitled to their fundamental rights and guarantees without discrimination based on race, nationality, religious belief or political opinion.[38]

2.3 *Humanitarian Principles*

Humanitarian principles represent the foundation and values of humanitarian relief.[39] They guide the work of humanitarian actors and reassure the outside world that the sole purpose of humanitarian action is to provide relief and nothing else.[40] The four core principles of humanitarian relief are *humanity, impartiality, neutrality and independence*.[41] The principles of humanity and impartiality are explicitly mentioned in Article 18 of Additional Protocol II

34 For example, the principle of non-discrimination is enclosed in the humanitarian principle of neutrality, See Chapter 2 VII.

35 HAIDER, p. 17.

36 HAIDER, p. 17 f.

37 The Trial Chamber of the ICTY found in the case *Prosecutor v. Zenjil Delalic et. al* that "inhuman treatment is an intentional act or omission that is an act which, judged objectively, is deliberate and accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity," see ICTY, *Prosecutor v. Zenjil Delalic et. al.*, para. 543.

38 HAIDER, p.18.

39 SCHENKENBERG VAN MIEROP, p. 296.

40 AKANDE/GILLARD, Oxford Guidance, pp. 9 and 14.

41 SCHENKENBERG VAN MIEROP, p. 296.

as attributes of relief actions in non-international armed conflicts, without constituting a legal obligation for humanitarian actors.[42] In the UN General Assembly Resolution 46/182 (1991), humanity, neutrality and impartiality were endorsed as core principles.[43] In 2004, the General Assembly added the principle of independence as a fourth core principle of humanitarian action in its resolution 58/114 (2004).[44] The importance of respecting the humanitarian principles of humanity, neutrality, impartiality and independence has also been stressed by the Security Council in several resolutions.[45]

Although the four humanitarian principles provide a standard for all humanitarian actors, the individual approach of different actors may vary. This aspect will be outlined and discussed in more detail later.[46]

2.4 *International Human Rights Law*

2.4.1 Application of IHRL and IHL during Armed Conflicts

Further, there may be situations in which IHRL provides a higher standard of protection for the civilian population due to its specificity in comparison to IHL. This added value of IHRL is often mentioned by authors as a supporting argument for the application of IHRL in situations of non-international armed conflict.[47]

International human rights law (IHRL) and IHL share the aim of protecting individuals and ensuring respect for their life, well-being, and human dignity.[48] Historically, the difference between IHRL and IHL has been that the former applies in times of peace and the latter in times of armed conflict. However, modern international law recognises that human rights are inherent to all human beings and can be affected in times of peace as well as in times of war. It is therefore now accepted that international humanitarian law also applies during armed conflict.[49] However, there are different theories on how IHRL can be applicable in relation to IHL during armed conflict. While the ICRC

42 Van den Herik/Jägers/Werner, CAVV Advisory Report, p. 9.

43 It states that: "humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality", UN GA Resolution 46/182 (1991). para. 2.

44 UN GA Resolution, UN Doc. A/Res/58/114, 2 Februar 2004; on the overall topic, see OCHA, Humanitarian Principles, p. 1.

45 For example, in UN SC Resolution, UN Doc. S/RES/1894, 11 November 2009, para. 13; on the overall topic, see SFDFA, Normative Framework, p. 26 with further references.

46 Haider, p. 6; Spieker, p. 7.

47 Sivakumaran, Non-international Armed Conflict, p. 94 with further references.

48 OHCHR, p. 7.

49 ICJ, *Advisory Opinion on Construction of a Wall in Occupied Palestinian Territory*, para. 106; see also Akande/Gillard, Oxford Guidance, p. 7; Haider, p. 19; Kuijt, p. 59.

advocates the theory of complementarity, according to which the two bodies of law are distinct and do not overlap, but can complement, strengthen and reaffirm each other, MERANO advocates the theory of convergence, according to which cumulative application is possible and necessary where the rules of the two bodies of law overlap in order to maximise the protection of human rights during armed conflict.[50] In the end, it makes little difference which theory is followed. Irrespective of whether the provisions of both bodies of law complement or overlap, when applying IHL it is important to note that IHL constitutes the *lex specialis* in relation to armed conflict and therefore outlines the content of human rights during armed conflict and their limitations.[51] Furthermore, there may be situations in which IHRL, by virtue of its specificity, provides a higher standard of protection for the civilian population than IHL. This added value of IHRL is often cited by authors as an argument for its application, particularly in situations of non-international armed conflict where treaty provisions are limited.[52]

2.4.2 Relevant IHRL Provisions

There are a number of IHRL provisions that are relevant in the context of humanitarian crises and relief operations. Of particular relevance to humanitarian action are basic guarantees such as the right to life, food, water and sanitation, adequate housing, and the right to health, including essential medicines and medical care.[53] Also relevant are human rights related to physical integrity, such as the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. The provision of relief must also respect the principle of non-discrimination under international humanitarian law.[54] The IHRL treaties encompassing these rights are the UN International Covenants on Civil and Political Rights (ICCPR)[55] and on Economic, Social and

50 MERON, p. 301; on the overall topic, see KÄLIN/KÜNZLI, p. 200 and OHCHR, p. 6.

51 KÄLIN/KÜNZLI, p. 201. It is however to be noted that IHL does not constitute *per se the lex specialis* in situations of armed conflict, it rather depends on the matter of the regulation which law shall be considered as lex specialis, see OHCHR, pp. 59 and 63; OBERLEITNER p. 102.

52 SIVAKUMARAN, Non-international Armed Conflict, p. 94 with further references.

53 AKANDE/GILLARD, Oxford Guidance, para. 7; RODENHÄUSER, p. 3 with further reference; see also KÄLIN, p. 353; HAIDER, p. 13; Since the right to water is in not yet recognised in the international community, it is not mentioned in the present book.

54 ICRC, Study on Customay Law, p. 301.

55 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

Cultural Rights (ICESCR)[56] and, at the regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms (or European Convention on Human Rights, ECHR)[57], the American Convention on Human Rights (ACHR)[58], the African Charter on Human and Peoples' Rights (ACHPR)[59], and the Arab Charter on Human Rights[60]. There are also specific thematic human rights conventions covering relevant rights, such as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter referred to as the UN Convention against Torture),[61] the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[62] and the Inter-American Convention to Prevent and Punish Torture.[63]

2.5 *International Criminal Law*

International criminal law plays an important role in the enforcement and individual accountability for serious violations of IHL and IHRL.[64] The most important source at international level here is the Rome Statute of the International Criminal Court (hereafter referred to as the Rome Statute to ICC)[65] which contains the most complete and up-to-date definition for international crimes.

There is no explicit provision in the Rome Statute that defines the arbitrary withholding of consent to humanitarian assistance as a crime.[66] However, the arbitrary withholding of consent can nevertheless result in an act that is

56 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

57 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

58 Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose," Costa Rica, 22 November 1969.

59 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

60 League of Arab States, Arab Charter on Human Rights, 15 September 1994.

61 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

62 Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, ETS 126.

63 Organization of American States (OAS), Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series, No. 67.

64 ROTTENSTEINER, p. 556.

65 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6.

66 FARQUHAR, p. 3 and 7.

considered a crime under the Rome Statute. There are three core crimes under the Rome Statute: war crimes, crimes against humanity and genocide.[67] It will be examined whether and under what conditions the withholding of consent may constitute one of these crimes. Specifically, the prohibition of intentionally using starvation as a method of warfare by obstructing the delivery of relief will be discussed in detail.[68]

67 Haider, p. 13; Rottensteiner, p. 555.
68 See Chapter 13 4.1.3.

CHAPTER 3

The Concept of Humanitarian Relief

1 Historical Perspective

Although there has always been an understanding throughout history of helping those who are hungry, wounded or in danger, it is only recently that there has been a consensus that help should be given to those in need without discrimination, whether they are friends or enemies.[1] In the Middle Ages, one of the first organisations in Europe to care for the wounded and sick was the Christian Order of Knights, which was faith-based and restricted to people of the same religion.[2] The beginnings of organised international humanitarian aid as we know it today can be traced back to the late 19th century. The North China Famine of 1876–1879 was one of the earliest instances where an international network was set up to raise funds. A simultaneous campaign was launched in response to the Great Famine of 1876–1878 in India. Relief during armed conflicts became an issue in the first half of the twentieth century.[3] It was ultimately the ICRC that led to the legal regulation of humanitarian relief.[4] Until the Geneva Conventions of 1949, there were no legal rules governing relief operations.[5] Later, natural and man-made disasters encouraged the development of humanitarian law in this field as well.[6]

Over the years, different situations of humanitarian crisis have led to a broadening of the earlier concept of relief in terms of content, scope and actors involved. Events such as Biafra, Somalia, the Balkan War and, in particular, the Rwandan genocide, and the failure of the humanitarian system to respond appropriately, have led to "lessons learned" initiatives and the development of guidelines aimed at improving the professionalism and quality of humanitarian assistance. Humanitarian aid is a concept that has evolved over time and will continue to evolve and adapt to new situations and challenges.[7]

1 Von Pilar, p. 29.
2 Von Pilar, p. 30 f.
3 Spieker, p. 7.
4 Von Pilar, p 35; Spieker, p. 8.
5 Spieker, p. 8.
6 Spieker, p. 8 f.
7 Lieser, p. 17.

2 Defining Humanitarian Relief

There is no universally agreed definition of humanitarian relief. Neither international law nor international courts and tribunals have conclusively defined its nature.[8] However, humanitarian assistance can be distinguished from other forms of aid by its objective, its content and the manner in which it is delivered.

2.1 *Characteristics of Humanitarian Relief*

The term "relief" is often, including in this book, used interchangeably with expressions such as "assistance", "aid", or "actions". The term "humanitarian" is found in different contexts and in general expresses the concern of helping people in need.[9]

Humanitarian relief is a response to humanitarian emergencies, either in the immediate aftermath of a man-made or natural disaster (also called disaster relief) or during armed conflict. The primary objectives of humanitarian relief are to save lives, reduce suffering and uphold human dignity. Humanitarian aid includes short-term activities such as the provision of goods and services to meet people's basic needs. However, in situations of protracted armed conflict, humanitarian relief is also concerned with sustainability and the provision and development of certain standards of living for civilians living in fragile environments. In such circumstances, assistance may also include capacity-building and post-conflict reconstruction, such as mine clearance or programmes for the return and reintegration of refugees or internally displaced persons.[10] Such long-term activities are particularly difficult to distinguish from development assistance.[11]

Relief during armed conflict is generally designed as short-term help to provide essential supplies such as food,[12] water, clothing, shelter, and services like medical care[13] and logistics services which are necessary for the survival of

8 Farquhar, p. 9.

9 Lieser, p. 9 f.

10 On the overall topic, see Spieker, p. 11 f.

11 Nevertheless, conflict resolution is at no point part of humanitarian relief; see more herto sfdfa, Normative Framework, p. 13; Lieser, p. 9 f.

12 Essential foodstuffs are those necessary for the normal physical and mental health of all categories of people, such as milk, flour, sugar, fats, salt, and drinking water, see Akande/Gillard, Oxford Guidance, p. 36.

13 Medical care includes medical supplies and equipment which are necessary for the care of the wounded and sick. It is not required that they are only life-saving treatments, but also encompasses pharmaceutical items which are used in preventive or therapeutic medicine, Akande/Gillard, Oxford Guidance, p. 34.

the affected civilians.[14] Some relief goods can be found in indicative lists of IHL treaty norms.[15] However, these lists are not exhaustive; relief operations in armed conflict may include other goods and services designed to save lives and alleviate the suffering of affected civilians.[16]

2.2 *Distinction from Other Forms of Aid during Armed Conflicts*

The characteristics of humanitarian relief described before enable it to be distinguished from other forms of aid which can be provided during situations of armed conflict, such as development assistance (2.2.1) or peace-keeping missions (2.2.2).

2.2.1 Development Assistance

While humanitarian relief aims to provide an immediate response to life-threatening needs in humanitarian emergencies caused by armed conflict or natural disasters, development assistance aims to provide sustainable solutions to crises caused by long-term factors such as poverty, underdevelopment or injustice, which may also be the result of protracted armed conflict. Development assistance is always a long-term intervention in developing countries in response to systemic problems. Its focus is not primarily on saving lives, but on supporting economic, social, or political development and helping to build capacity to ensure resilient communities and sustainable livelihoods. Humanitarian and development assistance are interlinked. Particularly in protracted emergency situations, development and humanitarian assistance often operate in parallel.[17]

2.2.2 Peace-Keeping Missions

Peace-keeping missions can take many forms. They are deployed by third parties (often international organisations such as the UN) during or after conflict situations and include monitoring and supervising the peace process as well as actions to protect affected civilians. Humanitarian relief and peacekeeping missions can co-exist, but while humanitarian relief focuses exclusively on the needs of the affected civilian population, peacekeeping missions generally also pursue political interests.[18]

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14 KUIJT, p. 54 f.; SFDFA, Normative Framework, p. 13; LIESER p. 10; Spieker, p. 7.

15 For example, Art. 59 para 2 GC IV, art. 69 AP I and art. 18 AP II.

16 AKANDE/GILLARD, Oxford Guidance, para. 8.

17 On the overall topic, see SPIEKER, p. 11 f.

18 SIVAKUMARAN, Non-International Armed Conflict, p. 324 ff.

3 Implementation of International Humanitarian Relief

In theory, the provision of international humanitarian assistance in situations of armed conflict is straightforward: if the conditions for humanitarian relief – as outlined before – are met, i.e. if an ongoing armed conflict leads to a humanitarian crisis for the population of the affected State and the parties to the conflict are unable or unwilling to provide assistance, international humanitarian actors can offer their help. After obtaining the necessary consent, humanitarian actors can take the necessary steps to provide assistance. This includes sending relief supplies, experts and humanitarian workers to the affected State to provide goods and services in cooperation with the local authorities with the aim of alleviating the suffering of the affected civilian population. In reality, however, the provision of humanitarian relief is less smooth and effective.[19] What follows is an outline of the most challenging aspects of delivering humanitarian aid. These include the process of negotiating humanitarian access and obtaining consent to provide relief in the first place (3.1). An important aspect of implementation is deciding whether to provide assistance along the frontline or across the border (3.2). Effective implementation also requires that relief personnel and supplies are protected in their movement, or at least in certain areas such as humanitarian spaces and corridors, and have protected access to people in need (3.3), and that the various relief efforts are coordinated (3.4).

3.1 *Negotiating Humanitarian Access*

Humanitarian access is understood in two ways: as the ability of humanitarian actors to reach affected civilians, and as the ability of the affected civilians to access humanitarian assistance and services.[20] In reality, it is almost never the

19 Lieser, p. 16.

20 SFDFA, Normative Framework, p. 13; In this regard, it is worth mentioning, that in October 2016 the Centre of Competence on Humanitarian Negotiation (CCHN), based in Geneva, was launched by five leading humanitarian organisations, namely ICRC, UNHCR, the World Food Program (WFP), MSF and the Centre for Humanitarian Dialogue (HD). The aim of the Centre is to support humanitarian organisations in the challenges they face in the humanitarian negotiation process. In December 2018, the Centre presented its first edition of a Field Manual on Frontline Humanitarian Negotiation which outlines the collective experiences and perspectives of humanitarian practitioners and offers a set of concrete tools and methodologies for planning and preparing negotiation processes in order to assist and protect civilians affected by armed conflict and other forms of violence. In November 2019, the Manual got updated with additional tools; for more information, see the website https://frontline-negotiations.org (last visited 31 August 2023).

case that humanitarian actors can simply offer their services and gain access within a short period of time. The provision of humanitarian assistance often requires a process of negotiation in order to obtain consent and access to provide humanitarian assistance. Negotiating humanitarian access is therefore one of the key challenges for humanitarian actors.[21] Even if the modalities of provision and transit as such are not technically part of the initial access negotiation process, in practice the two aspects may overlap in the discussion.[22]

Humanitarian access is the result of negotiations not only with parties to conflict, but also with civil society and other relevant stakeholders. Consent is not only an important legal requirement for the provision of humanitarian relief, but also a practical tool for security purposes.[23] Building relationships with all relevant stakeholders and gaining their acceptance and consent for the presence and work of the humanitarian actor in the operational area, even where not legally required, helps to reduce potential threats.[24] Experience has shown that involvement in projects that meet the specific needs of communities can further increase acceptance. For example, local communities have sometimes intervened on behalf of aid workers with parties to a conflict, or taken active steps to ensure that humanitarian organisations are able to deal effectively with local security risks, when the aid was in their particular interest.[25]

3.2 *Crossline and Cross-Border Provision*

Humanitarian operations can be implemented either crossline or cross-border. These terms are not used in international law, but they are established terms in the relief practice for the two main forms of providing international humanitarian assistance.[26] Crossline relief is provided within a country, but across the front lines of a non-international armed conflict.[27] When thinking of crossline operations, there is often the assumption that a conflict party is more or less unified and exercises fairly permanent control over a well-defined territory. This may occasionally be the case, but in general, the situation on the ground is usually more fluid and complex. Nevertheless, crossline relief is the most frequent way of providing relief, as it allows direct access to the

21 Von Pilar, p. 35; SFDFA, Normative Framework, p. 13.
22 See Chapter 8 2.
23 Jackson/Zyck, p. 45.
24 Egeland/Harmer/Stoddard, p. xi; Jackson/Zyck, p. 45.
25 Jackson/Zyck, p. 45 ff.
26 Gillard, p. 4; Van den Herik/Jägers/Werner, CAVV Advisory Report, p. 11.
27 Van den Herik/Jägers/Werner, CAVV Advisory Report, p. 29.

population.[28] Cross-border relief, on the other hand, refers to the provision of assistance form a third country, often a neighbouring State, and therefore crosses international borders. Cross-border relief can be provided in a number of ways, for example by sending relief supplies from a neighbouring, non-belligerent State to humanitarian actors operating in the affected State. In the past, there have been several instances where assistance has been provided in this way.[29] Another form of cross-border assistance is remote (or limited access) programming, where international actors transfer greater responsibility for the implementation of programmes to local staff or partner organisations in the affected state.[30]

The distinction between cross-line and cross-border relief assistance does not affect the legal rules applicable to the provision of humanitarian relief, but there are additional legal challenges if relief is implemented as a cross-border action, as it involves a third party in the operation.[31] In particular, it raises the question of whether and how neighbouring States are obliged to cooperate, which will be discussed in more detail later.[32] The decision to provide humanitarian assistance through cross-border operations is often based on security concerns in the affected State that prevent international actors from providing adequate assistance or establishing operational offices. Cross-border operations may also be considered when the affected State does not give its consent to the provision of assistance in-country, or because it has subsequently withdrawn its consent, for example by imposing burdensome administrative requirements that make cross-border operations de facto impossible.[33] In such cases, cross-border relief remains the most efficient and often the only way to provide relief.[34]

3.3 *Requirement of Protection, Humanitarian Spaces and Corridors*

The effective provision of humanitarian relief requires the protection of humanitarian actors and relief supplies. Humanitarian actors must, as far as possible, be able to move freely within the country without interfering with military operations. It is therefore not only their right but also the duty of the parties to the conflict to provide this protection, as will be discussed in depth

28 Gillard, p. 5.
29 On the overall topic, see on the whole Gillard, p. 4 f., with further references.
30 Gillard, p. 4; Egeland/ Harmer/Stoddard, p. xiv.
31 Gillard, p. 4; Van den Herik/Jägers/Werner, cavv Advisory Report, pp. 11 and 29.
32 See Chapter 9 1.
33 See forms of withholding consent later, Chapter 11 2.
34 Gillard, p. 5.

later.[35] In cases where it is not possible to ensure a general freedom of movement for humanitarian actors, so-called humanitarian spaces or corridors can be created at the request of humanitarian actors, whereby a limited geographical area is defined as a space in which humanitarian actors are granted free access to people in need, unimpeded contact and communication with them, and the ability to distribute aid on the basis of humanitarian principles.[36]

3.4 *Coordination of Relief*

The number and diversity of humanitarian actors operating in the field requires coordination to ensure a coherent and effective humanitarian response. There is no legal standard that governs or regulates the interaction between humanitarian organisations. However, given the humanitarian principles, in particular the principle of humanity, coordination is essential to avoid duplication and maximise the impact of multiple aid providers.[37]

There are three types of coordination: a strategic plan for an effective response to a humanitarian emergency can either be led by one or more actors, or it can be found by consensus of the majority of humanitarian actors involved, or it can be given by default. As each coordination context is unique, each approach has its own advantages and challenges.[38]

Coordination of international relief takes place within three main networks to which most humanitarian organisations belong. The first is the network of UN agencies, consisting of the Emergency Relief Coordinator, the Inter-Agency Standing Committee, the UN Office for the Coordination of Humanitarian Affairs (OCHA) and the Humanitarian Coordinators (at country level). The second is the Red Cross/Red Crescent Movement network, which includes coordination between the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and National Red Cross and Red Crescent Societies. The third network consists of non-governmental organisations, such as the International Council of Voluntary Agencies and the Steering Committee for Humanitarian Response. There are also mechanisms to further facilitate and enhance coordination. For example, there is the Global Humanitarian Platform, which aims to bring together the three networks to enable coordination within and between these groups.[39]

35 See Chapter 6 2.9.

36 LIESER, p. 14; HERMANN, p. 12.

37 ATHA, Humanitarian Coordination, pp. 1 ff.

38 ATHA, Humanitarian Coordination, p. 5.

39 On the overall topic, see ATHA, Humanitarian Coordination, pp. 4 and 7.

4 Dilemma: Principle of 'Do No Harm'

One of the central dilemmas of humanitarian relief in armed conflict is how to gain access to people in need without indirectly supporting the parties to the conflict who are oppressing the civilian population.[40]

Do no harm is one of the most important operational principles of humanitarian organisations, as humanitarian relief has the potential to be turned into political and military exploitation.[41] For example, when a government's armed forces are actively involved in what are supposed to be humanitarian operations in order to win the favour of the population. There are also many examples of the work of humanitarian organisations being used by parties to a conflict to target the population. For example, when their participation in relief operations has been used to locate the places where civilians, especially members of a particular ethnic group, are hiding in order to attack them later.[42] When humanitarian relief becomes, or is perceived to be, part of a military or political strategy, humanitarian actors run the risk of being deliberately targeted by opposing sides. Respect for humanitarian principles, in particular the principles of neutrality and impartiality, can help humanitarian actors to maintain a certain distance from the parties to a conflict, but it cannot prevent all possible politicisation or militarisation, since a certain degree of engagement with the parties to a conflict is inevitable in order to provide assistance and reach all people in need.[43]

Moreover, adherence to humanitarian principles in itself can present a dilemma, which will be discussed in more detail later.[44] For example, the perception of remaining independent in decision-making may in some circumstances contradict the objective of assisting and protecting civilians, and humanitarian organisations are faced with the difficult question of which approach is best for the civilian population concerned. The fact that members of humanitarian organisations, through their presence in the field, may be witnesses to crimes and coercion committed against civilians in conflict situations may raise the question of whether the principle of neutrality implies confidentiality or whether humanitarian actors also have a responsibility to report and denounce serious violations.[45]

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40 Von Pilar, p. 37.

41 Von Pilar, p 29 f.

42 For instance, relief organisations were used to locate the places where the vulnerable members of a population were hiding to later attack them; see Herman, p. 15.

43 Herman, p. 15.

44 See Chapter 8 1.

45 For more see Chapter 8 1.

CHAPTER 4

Situations of Non-international Armed Conflict

Determining whether a situation in a country is a non-international armed conflict is essential for the application of the rules. It is therefore important to understand the defining characteristics of a non-international armed conflict (1). IHL does not apply to situations involving less serious forms of violence, such as internal disturbances or tensions. These situations must be distinguished from non-international armed conflicts (2). Finally, the rules of international humanitarian law can be applied to non-international armed conflicts only if the armed conflict is not international in character (3).

1 Definition

Neither Common Article 3 of the GCs nor AP II contains a general definition of what constitutes a non-international armed conflict. Common Article 3 of the GCs describes that it applies to

> armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.

However, it does not define the elements of an armed conflict of a non-international character.[1] On the other hand, Article 1 of AP II provides a definition of a non-international armed conflict by stating that AP II is applied to armed conflicts

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

But this definition is a narrow interpretation of a non-international armed conflict. Firstly, it requires a territorial control by the conflict parties and, secondly, it does not apply to armed conflicts occurring only between non-State

1 ICRC, Armed Conflict, p. 2.

armed groups. As Article 1 of AP II states that this Protocol "develops and supplements" the provision of Common Article 3 "without modifying its existing conditions of application", it is generally accepted that this definition is only relevant for the application of Protocol II, without restricting the scope of application of Common Article 3 in general. Thus, when the International Criminal Tribunal for the former Yugoslavia (ICTY) was tasked in the *Case of Tadić* to adjudicate war crimes committed in the context of a non-international armed conflict, it reflected the notion of a non-international armed conflict in the sense of Common Article 3 more broadly, such as:

> a (…) protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[2]

Since then, this formula has been applied by the ICTY and other tribunals and international bodies[3] for the common definition of non-international armed conflicts. It has also been included in the Rome Statute of the International Criminal Court (ICC)[4] and is today recognised as a rule of customary international law.[5] This definition provides not only elements to identify a non-international armed conflict, but also to distinguish it from other forms of armed violence such as internal tensions and disturbances, as well as international armed conflicts.[6]

2 Distinction from Internal Tensions and Disturbances

Internal disturbances and tensions, but also other forms of short-term insurrection such as banditry or terrorist activities which are isolated and sporadic, are excluded from the definition of a non-international armed conflict (which is also explicitly mentioned in Article 1(2) AP II),[7] as they do not reach the required threshold of confrontation.[8]

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2 ICTY, *Prosecutor v. Tadić*, para. 70.

3 For a summary on acceptance in international practice see Cullen, p. 120 f.

4 Article 8(2)(f) ICC Statute.

5 See BOTHE, p. 423; SIVAKUMARAN, Non-International Armed Conflict, p. 155.

6 On the overall topic, see RODENHÄUSER, p. 8.

7 Article 1(2) AP II: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

8 ICTY, *Prosecutor v. Tadić*, para. 562; the formulation from there is also explicitly reflected in Article 1(2) of APII; see on the whole ICRC, 'How ist the Term "Armed Conflict" Defined in International Humanitarian Law?', Opinion Paper, March 2008, p. 3.

Referring to the definition in the case the *Case of Tadić*, the ICTY clarified that key elements of an armed conflict in the sense of Common Article 3 of the GCs are the intensity of violence and the organisation of the conflict parties[9] Article 1(1) AP II reaffirms these criteria in its definition, but sets a higher threshold by adding that non-State armed groups should be able to control a part of a territory.[10] However, this is not a requirement *sine qua non* for the existence of a non-international armed conflict in general, although it may be a strong indicator of the degree of organisation of the armed group. The requirements of sufficient intensity of violence and the degree of organisation of the non-State party have been established[11] as the two sole criteria to distinguish a non-international armed conflict from internal disturbances and tensions.[12]

2.1 *Intensity of Violence*

For a non-international armed conflict to exist, the degree of violence occurring must go beyond what States are normally confronted with and are able to contain by means of law enforcement. In their jurisprudence, the ICTY and the ICC have referred to indicators of a sufficient degree of violence for an armed conflict, namely the type and number of armed forces involved, the type of weapons used, the extent of destruction caused, the calibre of ammunition fired, the frequency of attacks and the number of victims, the duration of the conflict and the fact that the situation has attracted the attention of the UN Security Council.[13] None of these indicators is decisive by itself.[14]

The determination as to whether the violence has reached a certain level of intensity does not normally pose the major challenge in the distinction between armed conflict and internal violence as the indicative factors can be

9 ICTY, *Prosecutor v. Tadić*, para. 70.

10 Article 1(1) AP II: "other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations."

11 Since the case *Tadić,* the ICTY has applied the definition many times, for example in *Prosecutor v. Ramush Haradinaj, et al.*, para. 49 and also by the ICC for example in *Prosecutro v. Lubanga Dyilo*, Case Nr. 01/04-01/06, 537–538 (ICC mar. 14, 2012).

12 On overall topic, see RODENHÄUSER, p. 8; see also ICRC, Armed Confict, p. 1, SFDFA, Normative Framework, p. 33; HAIDER, 16 f.

13 ICTY, *The Prosecutor v. Fatmir Limaj*, para. 135–170; ICTY, *Proscutor v. Ramush Haradinaj et al.*, para. 49.

14 RODENHÄUSER, p. 9.

easily determined from the outside. In contrast, the degree of organisation of the parties to the conflict is more difficult to assess in practice and is therefore the crucial element in classifying the conflict.[15]

2.2 *Organisation of the Conflict Parties*

Since the application of IHL establishes equality of rights and duties among the conflict parties, an armed conflict requires conflict parties which are sufficiently organised to act according to IHL and which can rely on similar behaviour from the other party.[16] A sufficient degree of organisation therefore requires the ability to engage in military operations as well as the ability to respect the fundamental rules of IHL and other obligations of law. This, however, is not possible if the armed group is represented by only loosely connected individuals.[17] Indicators for the assessment of a minimum level of organisation are the existence of a command structure that enables the planning and implementation of military operations over a longer period of time, access to weapons and other military equipment, and the ability to speak with one voice and implement legal rules.[18]

While it is generally assumed that a government's armed forces meet the requirement of sufficient organisation, non-State armed groups must prove the existence of a command structure and internal rules in order to be considered a party to the conflict.[19] Conflict classification in non-international armed conflicts is therefore particularly difficult, as non-State armed groups are often organised and developed during situations of unrest and violence.[20] For example, in Syria, right from the start of the crisis in 2011, State forces used a significant level of violence. However, in February 2012, the UN Commission of Inquiry found itself still unable to confirm that Syria was in a state of non-international armed conflict, despite the fact that several thousand people had been killed during the first years by the armed violence, because it was uncertain if anti-government groups such as the Free Syrian Army (FSA) had

15 On overall topic, see RODENHÄUSER, p. 9.

16 ICRC, International Humanitarian Law, p. 231.

17 See on the overall topic, see RODENHÄUSER, p. 9.

18 SCHINDLER, p. 147; see also ICTY, *The Prosecutor v. Fatmir Limaj*, para. 94–134; ICTY *Proscutor v. Ramush Haradinaj et al.*, para. 60. However, this capability does not lead to actual respect of IHL. A well-organised party to an armed conflict may still decide not to respect the fundamental rules IHL; see BOSKOSKI/TRAKULVOSKI, p. 199–206; on the overall topic, see RODENHÄUSER, p. 9; HAIDER, p. 16.

19 HAIDER, p. 17; ICRC, Armed Confict, p. 3.

20 RODENHÄUER, p. 7.

actually reached the required level of organisation.[21] It was only one month later, in May 2012, that the ICRC declared that violence in some parts of Syria during the preceding months had amounted to an armed conflict. Thus, not even a high degree of violence is decisive for qualifying a situation as a non-international armed conflict if the violence is primarily one-sided and the organisational level of the other party appears uncertain.[22]

3 Distinction from International Armed Conflict

In order to distinguish a non-international armed conflict from an armed conflict of an international character, it is sufficient to consider only the parties to the conflict (3.1).[23] The geographical scope, i.e. the location of the parties involved, does not play a role in the determination (3.2), although the intervention of a third State can transform an existing non-international conflict (or parts of it) into an international armed conflict (3.3).

3.1 *Conflict Parties*

A non-international armed conflict in the sense of Common Article 3, according to the definition in the *Case of Tadić*, is an armed confrontation between governmental armed forces and the forces of one or more armed groups, or between such groups. Thus, in a non-international armed conflict, at least one party has to be a non-State armed group.[24]

Considering the additional requirement in AP II of territorial control of the conflict parties, there are three types of non-international armed conflicts based on the actors involved: (i) conflicts between the State and a non-State armed group, where the latter has control over a part of the State's territory, (ii) conflicts between the State and a non-State armed group, where the latter does not have control over any part of the State's territory and finally, (iii) conflicts between non-State armed groups (which may or may not have territorial control). While the first category applies Common Article 3 and AP II, the latter two are covered only by Common Article 3.[25]

21 HRC, Report on the Syrian Arab Republic, p. 24 f. For more information, see RODENHÄUSER, p. 7.

22 RODENHÄUSER, p. 7.

23 ZEGVELD, Accountability, p. 136.

24 ZEGVELD, Accountability, p. 136.

25 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 7.

In contrast to non-international armed conflicts, an international armed conflict occurs whenever two or more States are engaged in an armed confrontation.[26] Common Article 2 of the GCs defines as an international armed conflict any "armed conflict which arises between two or more of the High Contracting Parties".[27] Similarly, the ICTY described in the *Case of Tadíc* an international armed conflict as "a resort to armed force between two or more States".[28] AP I extends the definition of international armed conflicts and also includes conflicts in which so called national liberation movements fight against colonial domination, alien occupation or racist regimes referring to their right to self-determination.[29] AP I thus stipulates that international armed conflict as an armed conflict between States is not limited *stricto sensu* to inter-State confrontations, but also encompasses conflicts between governmental forces and non-governmental groups. There is no conclusive clarification of the criteria which distinguishes these situations from a non-international armed conflict. The meaning of these terms is elusive[30] as the scenario referred to has never been officially recognised in practice as States that might be concerned did not ratify Additional Protocol I. However, while armed groups in non-international armed conflicts are required to demonstrate a certain level of violence and must possess a sufficient organisation, national liberation movements are judged on the basis of whether they represent a people fighting for their right to self-determination. However, the relevance of wars of national liberation is extremely limited in practice.[31]

3.2 *Territorial Scope*

The geographical location of the parties involved in a conflict does not matter for the determination of a non-international conflict. Often the members of a non-State armed group are based on the border of a neighbouring State.[32] Characterising a non-international armed conflict as an internal conflict does not mean that the conflict is confined within the borders of one single State.[33]

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26 ICRC, Armed Conflict", p. 1; SFDFA, Normative Framework, p. 24.

27 Common Article 2 of the GC of 1949.

28 ICTY, *Prosecutor v. Tadić*, para. 70.

29 Article 1 (4) AP I. On the overall topic, see O HAIDER, p. 16.

30 SIVAKUMARAN, Non-International Armed Conflict, p. 217.

31 SIVAKUMARAN, Non-International Armed Conflict, p. 222.

32 For example, the FARC fighting in Colombia were based on the border to Colombia on the territory of Ecuador, or the Lord's Resistance Army (LRA) had its base in South Sudan and crossed the border to carry out hostilities in Uganda, on the overall topic, with further examples, see SIVAKUMARAN, Non-International Armed Conflict, p. 230.

33 SIVAKUMARAN, Non-International Armed Conflict, p. 229 and 233.

The wording in Common Article 3 and AP II may lead to this misunderstanding[34], as they refer to armed conflicts which take place "*in* the territory of *on*e of the High Contracting Parties"[35] or within "*a* High Contracting Party".[36] However, the references to the territory in these articles aim to provide a distinctive element to armed conflicts that take place on the territories of States that are not parties to the Conventions or the Protocols.[37] Today, since the four Geneva Conventions are universally ratified and many norms of AP II have customary status, the reference has almost no practical significance.[38]

Thus, the law of non-international armed conflict does not require that a conflict be fought purely within the borders of a State. This conclusion also follows from other circumstances. For example, Articles 1 and 7 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) extended its jurisdiction to enforce the law of non-international armed conflict to the neighbouring countries, confirming that even a conflict that spreads across borders remains a non-international armed conflict.[39] The territorial scope of an armed conflict does not therefore provide a distinction between non-international and international conflicts.[40]

3.3 *Internationalisation*

The intervention of a third State has the potential to transform an existing non-international conflict or part of it into an international armed conflict. The involvement of third States in a non-international armed conflict is not uncommon and can take a number of different forms. These include financial support, the provision of arms, equipment, or training, as well as logistical or troop support. However, not every form is sufficient to internationalise the conflict.[41] Internationalisation is particularly possible through intervention with troops (3.3.1) or control over the opposing armed group (3.3.2).

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34 SIVAKUMARAN, Non-International Armed Conflict, p. 229.

35 Common Article 3 of the GCs.

36 Article 1 AP II.

37 SIVAKUMARAN, Non-International Armed Conflict, p. 229; SASSÒLI, Transnational Armed Groups, p. 8 f.

38 ICRC, Armed Conflict, p. 3; see also SIVAKUMARAN, Non-International Armed Conflict, p. 230.

39 SASSÒLI, Transnational Armed Groups, p. 8 f.

40 SIVAKUMARAN, Non-International Armed Conflict, p. 233.

41 SIVAKUMARAN, Non-International Armed Conflict, p. 222.

3.3.1 Intervention with Troops

A non-international armed conflict may become subject to the law of international armed conflict when a third State intervenes in that conflict with troops.[42] There are two principal approaches to the characterisation of the impact of intervention with troops. While the first approach argues that the intervention of a third State never leads to internationalisation, but may lead to a co-existing international armed conflict,[43] the second approach holds that the intervention of a third State always leads to an international armed conflict. Neither approach is suitable for every situation. The applicable law in the case of intervention by a third State depends, on the one hand, on the side on which the State intervenes and, on the other hand, on the closeness of the relationship between the intervening State and the party to the conflict which it is supporting. For example, if a third State provides troops on the side of the government against armed groups or on the side of an armed group fighting against another armed group, the conflict remains a non-international armed conflict because the nature of the conflict is still an armed confrontation between the State and armed groups.[44] But if a third State provides troops on the side of the non-State armed group fighting the government, the conflict may become internationalised if there is also a close relationship between the armed group and the intervening State, in the sense that their actions are closely linked and coordinated.[45] However, if there is little interaction between them, there are essentially two separate conflicts, one between the non-State armed group and the affected State, and another between the intervening State and the affected State. In this case, there is no internationalisation of the pre-existing internal conflict.[46]

3.3.2 Control over Armed Group

Even without the presence of the troops of a third State, a non-international armed conflict may become an international armed conflict, if the armed

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42 ICTY, *Prosecutor v. Tadić*, para 84.

43 For example, SCHINLDER p. 51; this approch was also taken by the ICJ in its judgment in the *Case Nicaragua*, where it considered the conflict between the government of Nicaragua and the Contras as a non-international armed coflict, ICJ, *Nicargua v. US*, para 219; on the overall topic, see SIVAKUMARAN, Non-International Armed Conflict, p. 223 with further references.

44 SIVAKUMARAN, Non-International Armed Conflict, pp. 222 and 224.

45 This close realtion is distinguished from the case where the armed group is under the control of the third State, see SIVAKUMARAN, Non-International Armed Conflict, p. 224 f.

46 SIVAKUMARAN, Non-International Armed Conflict, p. 222 ff.

group fighting against the affected State is acting under the control of a third State.[47]

It is controversial what level of control must be exercised by the third State to transform a non-international conflict into an international one. In the *Case of Nicaragua,* the ICJ required a test of 'effective control' to attribute the acts of the Nicaraguan rebels to the United States. Such an 'effective control' requires that the third State either issues instructions to the armed group concerning specific operations or enforces the perpetration by forcing them to carry out specific actions.[48] Even though this was set out in order to determine State responsibility, it has also been considered relevant in order to classify the internationalisation of an armed conflict.[49] The Appeals Chamber in the *case of Tadíc* stated that the internationalisation of an armed conflict requires that an outside State should exercise *overall control* over the armed group. The third State must be involved in organising, coordinating, and planning the military actions of the armed group; the mere provision of only financial assistance or military equipment or training is not sufficient. In contrast to the effective control, it is not necessary that the State also gives instructions for the commission of specific acts.[50] This interpretation has been followed in the subsequent jurisprudence of the ICTY and the ICC.[51]

Regardless of which view is taken, the requirement of control boils down to whether the degree of control is such that the third State is essentially using force against another State. It is therefore necessary to determine whether the degree of control is such that the armed group acts as an agent of the third State, so that the acts of the armed groups are attributable to the third State and the rules of IHL on international armed conflict apply to that conflict and bind the armed group acting on behalf of the third State. In this regard, the indications developed by the international tribunals in their assessment of effective or overall control may help to determine whether there is sufficient control.[52]

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47 SIVAKUMARAN, Non-International Armed Conflict, p. 227.

48 Wheter the United States "had effective control of the military or paramilitary operations in the course of which the alleged violations were comitted," ICJ, *Nicargua v. US*, para 115.

49 ICTY, *Prosecutor v. Tadić*, paras 585–607, on the overall topic, see SIVAKUMARAN, Non-International Armed Conflict, p. 226.

50 ICTY, *Prosecutor v. Tadić*, para 104.

51 On the overall topic, see SIVAKUMARAN, Non-International Armed Conflict, p. 226.

52 SIVAKUMARAN, Non-International Armed Conflict, p. 227 f. with further references.

PART 2

Rights and Duties of the Actors Involved in Relief Actions

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CHAPTER 5

Introduction

There is a large variety of rights and duties applicable to the different actors involved in non-international armed conflicts. A comprehensive and correct understanding of the respective rights and duties of all those actors involved in the provision of relief is crucial in order to ensure relief for the civilian population in need. The relevant legal provisions regarding humanitarian relief will be outlined later for each actor separately. Since an obligation of one party may imply at the same time the right of another actor, certain aspects are mentioned from both perspectives. It is to be noted that this chapter presents the material landscape of the rights and duties of the actors involved. The procedural side, namely the right to claim or invoke the breach of an obligation of another actor before an international court or body, will be discussed later in the context of the consequences in the case of arbitrary withholding of consent later.[1]

The widest range of rights and duties exists for the affected State (Chapter 6) as a sovereign entity with international legal personality. Here, the right of sovereignty represents not only an essential right, but the core principle from which all other rights and duties of the affected State result. On the other side, the duties and particularly the rights of non-State armed groups (Chapter 7) are the least developed and most controversial aspects in the context of armed conflict in general and humanitarian relief action in particular. The most important source for the work of the humanitarian actors (Chapter 8) are the humanitarian principles on which all other rights and duties are based. The obligations and rights of non-belligerent States (Chapter 9) depend on how they are affected by the provision of relief, particularly as neighbouring States. Finally, civilians (Chapter 10) have in particular rights in relation to their protections. However, in order to enjoy the protected status as civilians, they must also respect certain obligations.

1 See Part 4.

CHAPTER 6

Rights and Duties of the Affected State

1 State's Sovereignty as a Core Principle

A State's sovereignty based on its power over its territory and its population, provides both rights and duties for the affected State in a non-international armed conflict. The State's responsibilities towards the civilian population encompass all civilians under its jurisdiction, regardless of whether or not they are under its control, thus also civilians in parts of its territory which are under the effective control of the opposing non-State armed group.[1] The rights and obligations stemming from the State's sovereignty arise at different stages in the context of humanitarian relief: when the civilian population is in actual need, when humanitarian relief is offered by humanitarian actors and consent is required, and when humanitarian relief is provided.[2] The different rights and duties of the affected State in the context of humanitarian relief regulate and limit each other, so that the State's power is not absolute, but remains in balance with the interests of the concerned civilian population.

2 Rights and Duties

2.1 *Primary Responsibility to Provide Humanitarian Relief*

When the population within the territory of a State requires indispensable goods for its survival, it is one of the essential elements of the State's sovereignty to meet its needs.[3] This obligation exists in general (2.1.1), but also in particular in the context of armed conflicts (2.1.2), and is mirrored in the human rights of the civilian population, such as in their right to life, respect for which is even explicitly required from the conflict parties for situations of non-international armed conflict under Common Article 3(1) of the GCs and Article 4(2) AP II.

1 Stoffels, p. 520.
2 Van den Herik/Jägers/Werner, CAVV Advisory Repor, p. 12.
3 Instead of many, see SFDFA, Normative Framework p. 18.

2.1.1 In General

The duty to meet the needs of the civilian population is recognised in international law in different contexts. For example, the Guiding Principles on Internal Displacement provide that "national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction."[4] The United Nations General Assembly Resolution 46/182 states that for situations of natural disaster, "each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring in its territory".[5] The ILC's Draft Articles on the Protection of Persons in the Event of Disasters, in Draft Article 9, state that it is the affected State's duty to ensure that persons in its territory receive humanitarian assistance.[6]

From a human rights viewpoint, the UN Human Rights Council bases such obligations primarily on the right to life of the affected civilian population.[7] Further, the UN Committee on Economic, Cultural and Social Rights, in its General Comments on the right to food and water under the ICESCR, states that whenever an individual or a group are unable to enjoy the rights to adequate food and water by the means at their disposal, for reasons beyond their control, for example in situations of natural or other disasters, it is the State's duty to provide for these rights directly.[8]

2.1.2 In Situations of Armed Conflict

With regard to situations of armed conflict, only Article 55 GC IV and Article 69 AP I explicitly state that, during occupation, the occupying power has the responsibility to meet the needs of the civilian population under its control to the fullest extent of the means available. This includes food, medical provisions and other supplies which are essential to their survival, as well as objects

4 GA, Guiding Principles on Internal Displacement, UN doc E/CN.4/1998/53/Add.2, 11 February 1998, Principle 3 (1). Similar also in Principle 25(1): "The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities".

5 GA Resolution 46/189, Principle 4; on the overall topic, see AKANDE/GILLARD, Oxford Guidance, p. 11.

6 KUIJT, p. 58.

7 For example, HRC General Comment, No. 6: Right to Life (Art. 6), UN Doc. HRI/GEN/1/rev.9 (Vol. I), 30 Apr 1982, para 5; see to all of this with further references AKANDE/GILLARD, Oxford Guidance, p. 11.

8 CESCR General Comment No. 12: The Right to Adequate Food (Art. 11), UN Doc E/C.12/1999/5, 12 May 1999, para 15; and also in CESCR General Comments No. 15: The Right to Water (Arts. 11 and 12), UN Doc E/C.12/2001/11, 20 Jan 2003, para 25.

necessary for religious worship. However, there is no such provision explicitly emphasised for situations other than occupation.[9] This is due to the fact, that the draft articles to this effect in the Additional Protocols were retained by some States during the negotiation process. They objected to reminding a party to an armed conflict of its obligation to provide for the needs of its own civilian population. However, as correctly pointed out in the Oxford Guidance, this objection itself must already be considered as an acknowledgement of the existence of the obligation in situations of armed conflict other than occupation.[10] Also, the UN General Assembly and Security Council have reiterated in several resolutions on armed conflict that the primary responsibility to provide assistance lies with the affected State.[11] Further, Common Article 3 of the GCs and Article 4 AP II require parties to non-international armed conflicts to treat persons who are not taking an active part in the hostilities humanely, including respect for their life, health, and physical and mental well-being.[12] The concept of "humane treatment" is very broad. The Commentary to the APs interprets this as meaning that parties to an armed conflict should provide persons deprived of their liberty with some form of essential supplies like food, water and medical care.[13]

Thus, also in non-international armed conflicts, it is the affected State's primary responsibility to provide humanitarian assistance if the civilian population lacks supplies which are essential for their survival.[14] Likewise, the assistance must also be provided in a timely manner.[15] Having the primary role in the provision of relief actions includes not only the initiation and implementation of humanitarian assistance, but also, where such relief cannot be provided fully, at all or in a timely manner by the affected State itself, including national humanitarian actors, it requires that the State enables the provision of relief by international humanitarian actors.[16] This understanding is also

9 On the overall topic, see AKANDE/GILLARD, Oxford Guidance, p. 11 f.

10 AKANDE/GILLARD, Oxford Guidance, para. 12 and 13, with further references.

11 UN SC Resolutions, Protection of Civilians in Armed Conflict, UN Doc. (S/RES/1674), 2006, preamble and para. 13; UN Doc. (S/RES/1894), 2009, preamble and para. 15; UN GA, Resolution 46/182 (1991), Annex para 4. See also UN General Assembly Resoltuions 43/131(1988) and 45/100 (1990); UN SC Resolutions 1706(2006), para 12; 1814 (2008), para 17; 1894 (2009), preabular para 5 and 6; 1906 (2009), para. 3; 1910(2010), preambular para 16; 1923(2010), para. 2 and 1970(2011), preambular para 9.

12 Commona Article 3(1a) and Article 4(1, 2a) AP II.

13 ICRC, Commentary to the APs, paras 4507–4514 and 4567–4576; on the overall topic.

14 On the overall topic, see AKANDE/GILLARD, Oxford Guidance, p. 11 f.

15 SIVAKUMARAN, Withholding of Consent, p. 526.

16 On the overall topic, see AKANDE/GILLARD, Oxford Guidance, p. 11; VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 12; KUIJT, p. 57.

supported by provisions in international treaties, such as the UN Covenant on Economic, Social and Cultural Rights, which obliges State parties to progressively achieve the full realisation of the rights recognised in the Covenant by using the maximum of their available resources, which includes assistance offered from outside.[17] In the context of the right to housing, the Committee of Economic, Social and Cultural Rights has stated that, in order to fulfil its obligations, a State has to demonstrate that it has taken the necessary steps, "either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction."[18] The duty to enable the provision of relief from outside is, however, shaped by the following rights and obligations of the affected State.

2.2 *Right to Non-interference*

The State's right to non-interference from outside, based on respect of its territorial sovereignty, requires, in relation to international humanitarian relief, that such relief should not constitute an inadmissible interference. The ICJ stated in the case of *Nicaragua vs. US* that "the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law,"[19] if it is provided "without discrimination" and "limited to the purpose hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering,' and 'to protect life and health and to ensure respect for the human being'."[20]

Thus, the offer and provision of humanitarian relief in accordance with humanitarian principles does not constitute an inadmissible interference as such. However, this does not mean, that any humanitarian relief organisation can enter the territory of a State if it is done only in accordance with humanitarian principles. The State's territorial sovereignty and right to non-interference also allow it to control over who enters its territory. As already mentioned before and as it will be outlined in detail later, the provision of humanitarian relief therefore requires the consent of the affected State. This is also reflected in emergency situations outside armed conflicts, for example in the Guiding Principles on Humanitarian Assistance, annexed to General Assembly Resolution 46/182, which provide that with respect for sovereignty,

17 HAIDER, p. 20.

18 CESCR, General Comment No. 4, para. 13.

19 ICJ, *Nicaragua v. US,* para. 242.

20 ICJ, *Nicaragua v. US,* para. 243, on the overall topic, see RYNGAERT, Humanitarian Assistance, p. 6 f.

territorial integrity and national unity, humanitarian assistance may only be delivered with the consent of the affected State.[21] Insofar as the statement of the ICJ provides that relief assistance must strictly respect the humanitarian principles of humanity, impartiality and non-discrimination, offers of such a relief action cannot be regarded by a State as an inadmissible interference in its domestic affairs or as an unfriendly act.[22] This is explicitly stated in Article 70(1) AP I[23] and can be concluded for non-international conflicts implicitly from Common Article 3 GCs and represents today also a rule of customary law.[24] However, for the actual provision of humanitarian relief, the consent of the affected State is required, given that provision without consent may constitute a prohibited interference, even if such an act is in accordance with humanitarian principles.[25]

2.3 *Requirement of Consent*

2.3.1 In General

During the Diplomatic Conference for the Geneva Conventions in 1949, a stronger wording was suggested for Common Article 3 with regard to humanitarian relief during non-international armed conflicts: "[p]rovided that the other party to the conflict is also prepared to do so, the High Contracting Party concerned shall accept, if offered, the services of an impartial humanitarian body, such as the International Committee of the Red Cross".[26] However, this provision was rejected as it would have required that the State concerned has "to accept the services of a humanitarian body chosen by the insurgents".[27] Accordingly, a compromise was found in the wording that an impartial humanitarian body *may offer* its services without specifying what reaction is required from the State.[28] Thus, Common Article 3(2) GCs implicitly reflects the requirement of consent for the provision of humanitarian relief for non-international armed conflicts.[29] Article 18(2) AP II later explicitly stated for

21 SIVAKUMARAN, Strengthening coordination, p. 501 ff.

22 RYNGAERT, Humanitarian Assistance, p. 7; PICTET, Commentary on the GC I, p. 58.; SFDFA, Normative Framework p. 16 and 18; see ICJ, *Nicaragua v. US*, para 242.

23 Article 70 AP: "Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts."

24 AKANDE/GILLARD, Oxford Guidance, p. 15 with further references.

25 RYNGAERT, Humanitarian Assistance, p. 6 f. ; UN GA Résolution 46/182, para. 3; see KÄLIN, p. 352 f.

26 Final Record, Vol II-B, 90 (UK).

27 Final Record, Voll II-B, 95 (United States).

28 On the overall topic, see SIVAKUMARAN, Non-International Armed Conflict, p. 469.

29 ICRC Commentary on GC I, paras 730 and 828.

non-international armed conflicts[30] that "relief actions which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party". The ICRC stated in its Study on Customary IHL that most of the practices it could collect do not mention the requirement of consent for the provision of relief. It concludes, however, that the requirement of consent is nevertheless a self-evident aspect, since in practice a relief organisation can never act without the consent of the conflict party concerned.[31]

Although the requirement of the consent of the affected State is generally recognised, there are divergent views on the question of whether the consent of the affected State is also required when humanitarian relief operations are intended for civilians in areas which are no longer under the control of the affected State, but under the effective control of armed groups (2.3.2) or in the case of a failed State (2.3.3).[32]

2.3.2 For Areas under Effective Control of Armed Groups

It is commonly accepted that if areas under the effective control of armed groups are reached by a cross-line operation through territories under the State's control, the State's consent is required for the transit.[33] However, in situations where the area under the control of armed groups is reached by cross-border operations directly from a neighbouring country through a border post which the State no longer controls, the role of the affected State is uncertain.[34]

Common Article 3(2) of the GCs provides only that an "impartial humanitarian body (…) may offer its services to the parties to the conflict" and is silent with regard to which party the offer has to be made and whose consent is required. Some interpret the silence of Common Article 3(2) of the GCs as an implicit authorisation that humanitarian relief can be offered to and accepted by any of the conflict parties, and therefore can also be conducted if only the opposing non-State armed group consents for territories under its control.[35] It is further argued that, even if Article 18 (2) AP II makes an explicit reference to the consent of "the High Contracting Party concerned"[36] and thus of the State

30 AKANDE/GILLARD, Oxford Guidance, p. 16.
31 ICRC Study on Customary IHL, Rule 55, p. 196 f.
32 AKANDE/GILLARD, Oxford Guidance, para. 23; Advisory Report No. 25 of CAVV of Netherlands, p. 19.
33 AKANDE/GILLARD, Oxford Guidance, paras. 23, 28.
34 AKANDE/GILLARD, Oxford Guidance, para. 23.
35 AKANDE/GILLARD, Oxford Guidance, para. 25.
36 AKANDE/GILLARD, Oxford Guidance, para. 27.

party, in the case where relief operations are intended for civilians in territory under the effective control of an armed group which can be directly accessed from another country, the affected State cannot be considered "concerned" and consequently its consent cannot be required.[37]

However, such an interpretation would disregard the legal meaning of territorial sovereignty and the right to territorial integrity of a State. In particular, the justification that the State might not be considered as "concerned" with a humanitarian relief operation if it is provided in areas beyond its effective control contradicts the basic understanding of territorial sovereignty as a State's responsibility towards the whole population under the State's jurisdiction, irrespective of whether they are under its control or not.[38] According to the international law, States retain their territorial sovereignty even if their territory is occupied and placed under the authority of a hostile army. Thus, the sovereignty of a State and its responsibilities remain even if some parts are temporarily not under its effective control. The State's consent must therefore also be considered as required for humanitarian assistance to areas which the affected State no longer controls. Also, discussions within the UN show that sovereignty and territorial integrity always require the consent of the affected State.[39]

Thus, even if it may be practically feasible, legally, with regard to the State's territorial sovereignty and territorial integrity, the view must be followed that the consent of the affected State is always required when relief is provided on its territory, irrespective whether or not the State has control over the areas where relief will effectively be provided. The affected State must always be regarded as "concerned" in the sense of Article 18(2) AP II if the State's territory is involved.[40]

2.3.3 In Case of a Failed State

For example, in situations of occupation, a State retains its sovereign rights according to international law, even if it is considered as a failed State, and consequently its consent is still required for the provision of relief operations.

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37 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 19 f.; AKANDE/ GILLARD, Oxford Guidance, p. 17.

38 AKANDE/GILLARD, Oxford Guidance, p. 17.

39 Except in a few exceptional cases where humanitarian relief without consent is considered, see on this the discussions regarding Security Council Resolutions on humanitarian relief later in Chapter 18, II. 5.2, on the overall topic, see VAN DEN HERIK/JÄGERS/ WERNER, CAVV Advisory Report, p. 19 f. with further references.

40 AKANDE/GILLARD, Oxford Guidance, p. 17.

However, in situations where it is abundantly clear that there are no longer functioning authorities or it is not possible to determine the relevant authorities for the purpose of giving consent, it is suggested in the doctrine that the consent of the affected State may also be presumed, based on the assumption that the affected State would give its consent with regard to its duty to meet the needs of its civilians.[41] Such a far-reaching exception is, however, difficult to apply[42] and therefore has not yet been applied in practice.

2.4 *Right to Withhold Consent to Humanitarian Relief*

It is questionable if the State has a right or an obligation to consent to humanitarian relief with regard to the undue hardship of the civilian population during armed conflicts. For situations of occupation in international armed conflicts Article 59(2) GC IV provides that "if the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief measures on behalf of the respective population."[43] Thus, the occupying power has an obligation under IHL to grant access to outside humanitarian actors to provide humanitarian relief if such assistance is needed for the civilian population.[44]

However, such an obligation cannot be found for situations outside occupation.[45] With respect to non-international armed conflicts, Article 18 (2) of the AP II (similar to Article 70(2) of the AP I for international armed conflicts that are not covered by the occupation regime) provides that humanitarian relief "shall be undertaken subject to the consent of the High Contracting Party concerned."[46] The word "subject" indicates that the affected State does not have an unambiguous obligation to give its consent. Thus, for situations outside of occupation, it is argued in the doctrine that, based on the affected State's sovereignty and its right to non-interference, it remains the State's right to give or withhold its consent to humanitarian relief.[47]

41 ICRC Commentary on the APS, para. 4884.

42 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 20.

43 RYNGAERT, Humanitarian Assistance, p. 6.

44 KÄLIN, p. 352; RYNGAERT, Humanitarian Assistance, p. 6.

45 RYNGAERT, Humanitarian Assistance, p. 6.

46 Similarly, also Article 70 (2) AP I: "relief action which are humanitarian and impartial in character and conducted without any adverse distinciton shall be undertaken, subject to the agreement oft the Parties concerned in such relief actions."

47 RYNGAERT, Humanitarian Assistance, p. 6 f.

2.5 *Obligation Not to Withhold Consent for Arbitrary Reasons*

In view of the State's obligation to provide humanitarian relief to the civilian population in need, the State's right to withhold consent has to be interpreted in a limited sense. It is therefore accepted that the State may not have a deliberate right to withhold consent, but an obligation not to withhold it for arbitrary reasons. In other words, they may only withhold consent for valid reasons. This rule is not explicitly laid down in treaty law,[48] but can be derived for non-international armed conflicts from the interpretation of Article 18(2) AP II and, according to the ICRC Study, reflects a rule of customary law.[49] The grounds and meaning of this obligation will be discussed in detail later.[50] It is, however, important to note at this point that, based on this rule, it can be concluded that if the withholding of consent to relief cannot be justified on the basis of a legitimate aim, the concerned party is obliged to give its consent.[51]

2.6 *Duty to Allow Entrance and Facilitate Passage*

The obligation to provide humanitarian relief includes the duty to enable the effective provision of relief consignments.[52] Therefore, once the initial consent to the provision of humanitarian relief has been granted,[53] it is the affected State's duty to allow actual entrance and to facilitate rapid and unimpeded passage of humanitarian relief personnel, supplies and equipment, and to further assist the provision of relief.[54] These duties are enshrined for international armed conflicts in several rules, for example in Articles 59 and 61 GC IV for situations of occupation and in Articles 23 and 30 GC IV and 70 and 71 (3) AP I for international armed conflicts outside situations of occupation. For situations of non-international armed conflict there are no such specific provisions, neither in Common Article 3(2) of the GCs nor in Article 18(2) AP

48 RYNGAERT, Humanitrian Assistance, p. 7.

49 ICRC Study on Customary IHL, Rule 55, p. 197 f.

50 See Chapter 12 1.

51 ICRC Study on Customary IHL, Rule 55, p. 197 with further references.

52 On the State's sovereignty and duty to facilitate see VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 12.

53 Even thoug it is not explicitly mentioned in any rules, it is self-evident that this rule concerns relief personnel and consignements that are authorised. A conflict party cannot be required to provide this duty to unauthorised relief goods, see ICRC Study on Costumary IHL, Rule 56, p. 201.

54 AKANDE/GILLARD, Oxford Guidance, p. 26, referring on ICRC Study on Customary IHL, Rules 55 and 56.

II.[55] The requirement to allow and facilitate access to humanitarian relief for civilians in need was included in the draft of AP II, but was deleted at the last moment with the goal to adopt a simplified text.[56] The ICRC's Study on Customary IHL, however, established that the duty of the conflict parties to allow entrance and facilitate passage has been developed into a rule of customary law that also applies in situations of non-international armed conflict.[57] In particular, the duty to facilitate relief is often invoked in practice in respect of non-international armed conflicts. The UN has also issued numerous statements and adopted numerous resolutions in this respect with regard to non-international armed conflicts.[58] It should be noted that the duty to allow and facilitate relief applies not only when the relief is initiated for civilians in the territory under the control of the State, but also for the transit of assistance through its territory to reach the civilian populations under the control of the adverse conflict party.[59]

2.6.1 Allow Entrance

Allowance to enter the territory should not be confused with the initial consent to humanitarian relief as such. Allowing entrance is the approval to the relief personnel and the relief consignment to effectively enter the territory in order to implement humanitarian relief. Article 71(1) AP I explains this requirement as: "humanitarian relief personnel may participate subject to the approval of the State in whose territory the humanitarian relief operation is intended to be conducted." The required approval may be given generally, for example to all personnel involved in a humanitarian relief operation, or individually, where a specific person's participation is requested.[60] In order to enable a rapid entrance, entry-visa procedures, for example, may be simplified or even temporarily waived.[61]

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55 Article 18 (II) AP II requires that relief actions for the civlians in need shall be undertaken, but does not contain any specific provisions, ICRC Custoamry IHL Study, Rule 56, p. 200; see on the wole Oxford Guidance, p. 26.

56 Draft Additional Protocl II, Article 33; see ICRC Study on Customary IHL, Rule 55, p. 194.

57 ICRC Study on Customary IHL, Rules 55 and 56; on the overall topic, see STOFFELS, p. 521 f; see also AKANDE/GILLARD, Oxford Guidance, p. 26.

58 ICRC Study on Cusotmary IHL, Rule 56.

59 Article 70(2) AP I, which refelcts customary law according to the ICRC Study on Customary IHL, Rules 55 and 56; see AKANDE/GILLARD, Oxford Guidance, p. 26.

60 AKANDE/GILLARD, Oxford Guidance, p. 30 referring on ICRC Commentary on the APs, para 2883.

61 AKANDE/GILLARD, Oxford Guidance, p. 27; ICRC Study on Customary IHL, Rule 55.

2.6.2 Facilitate Rapid and Unimpeded Passage

Facilitating the passage of humanitarian relief concerns the freedom of movement of the relief personnel and consignments within the country.[62] The freedom of movement is essential to reach all persons in need. Passage must therefore be rapid and unimpeded. This requires that the affected State must apply administrative procedures, formalities and other technical arrangements in good faith and to reduce them as far as possible[63] so that their extent and impact do not unnecessarily impede delivery.[64]

2.7 *Right to Prescribe Technical Arrangements and Restrictions*

As a counterpart to the obligation not to withhold consent arbitrarily and to allow and facilitate humanitarian relief, the State's sovereign right entitles it to exercise control over the relief action and to prescribe technical arrangements for the passage, for example, to search of consignments or to prescribe specific routes or times for the provision of relief.[65] Further, it also has the right to restrict the movement of humanitarian relief personnel and relief activities to a certain area.[66] Articles 70(3) and 71(3) AP I stipulate the right to prescribe technical arrangements and restrictions for international armed conflicts.[67] There is no similar rule in AP II, but since the ICRC Study on Customary Law was able to establish that the rule provided for in AP I is reflected in the treaty law and the practice of States, it is considered as a norm of customary law which is applicable also in situations of non-international armed conflict.[68]

Technical arrangements must be applied in good faith in order to be compatible with the State's obligation to allow and facilitate humanitarian relief. Their imposition or effect must not go beyond what is necessary, which

62 AKANDE/GILLARD, Oxford Guidance, p. 26.

63 For example customs inspection may be reduced and relief consignments may be exempted from charges and taxes. Similar to Article 61 GC IV, according to which in situations of occupation, where humanitarian relief consignments must be exempt from all charges, taxes or customs unless these are necessary in the interests of the economy of the occupied territory, for more information, see AKANDE/GILLARD, Oxford Guidance, p. 26.

64 AKANDE/GILLARD, Oxford Guidance, p. 26; VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 12.

65 Identified in VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 12.

66 AKANDE/GILLARD, Oxford Guidance, p. 26 ff.

67 For situations of occupation, only the right to technical arrangement is provided in Article 59 GC IV.

68 AKANDE/GILLARD, Oxford Guidance, p. 28: Article 59 GC IV and Article 70(3) AP I; see also ICRC Study on Customary Rule, Rules 55 and 56.

requires the application of the principle of proportionality.[69] The grounds for the arrangements must be reasonable and appropriate in face of the extreme needs of the civilian population.[70] Technical arrangements may serve a number of purposes that may be justified during armed conflicts. For example, the screening of consignments allows parties to an armed conflict to ensure that relief supplies are exclusively humanitarian and do not contain weapons or other military equipment and items that can be used for military purposes.[71] A prescription for routes at specific times may serve to prevent humanitarian convoys from being endangered or from hampering military operations.[72] Technical arrangements are usually the subject to special agreements and, in practice, are not provided together with the consent to humanitarian relief itself.[73]

The limits for restricting the activities and movements of humanitarian personnel are explicitly stated in Article 71(3) AP I. Accordingly, a restriction is only allowed for reasons of imperative military necessity such as ongoing military operations in a particular location which could endanger the security of the humanitarian actors.[74] The limitation of the freedom of movement of humanitarian personnel in cases of imperative military necessity is justified on the basis that relief operations must not be allowed to interfere with military operations so that the safety of humanitarian relief personnel is not endangered.[75]

However, such restrictions are only permitted temporarily[76] and the parties to the conflict have the duty to generally conduct hostilities in such a way that relief access to the civilian population can be maintained intact as far as possible.[77]

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69 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 20; AKANDE/GILLARD, Oxford Guidance, p. 29.

70 Basically, VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 20, AKANDE/GILLARD, Oxford Guidance, p. 29; and explicitly in Article 70(3)(c), which states that parties to the conflict shall not delay the delivery of relief consignments except in cases of urgent necessity in the interest of the civilian population concerned.

71 AKANDE/GILLARD, Oxford Guidance, p. 28.

72 On different purposes and further examples for reasonable technical arrangements see AKANDE/GILLARD, Oxford Guidance, p. 28.

73 AKANDE/GILLARD, Oxford Guidance, p. 29.

74 AKANDE/GILLARD, Oxford Guidance, p. 27 referring to Article 71(3) AP I for international conflicts; see also ICRC Study on Customary Law, Rules 55 and 56 for non-international conflicts.

75 ICRC Study on Customary IHL, Rules 56.

76 On the overall topic, see AKANDE/GILLARD, Oxford Guidance, p. 27; see also the ICRC Study on Customary IHL, Rule 56.

77 ROTTENSTEINER, p. 565.

2.8 *Obligation to Respect and Protect Relief Personnel and Consignments*

In order that humanitarian relief can be effectively provided, a minimum level of safety and protection must be guaranteed for relief personnel and consignments. This requires that they are respected and protected, which includes that relief personnel and objects are not attacked or subjected to other forms of violence[78] such as destruction or looting.[79] Freedom of movement is an important right of the humanitarian actors that has to be respected and can only be restricted under the before-mentioned conditions. The protection and respect required for relief personnel and consignments will be further outlined in detail later under the section on rights and duties of humanitarian actors.[80] It is sufficient to note here that the duty of the affected State to protect and respect is based on several legal sources. First and foremost, relief personnel and consignments are considered as civilians and civilian objects and therefore enjoy the protection of civilian persons and objects under IHL. Further, Articles 70(4) and 71(2) AP I explicitly state that the protection of relief personnel and consignments is a duty of the conflict parties of international armed conflicts.[81] As a rule of customary law according to the ICRC Study, this rule also applies in non-international armed conflicts.[82] Finally, attacks against humanitarian personnel and consignments during non-international armed conflicts are also prohibited offences under international criminal law. Besides these general protections, States may also have specific contracts with humanitarian actors which provide further privileges and immunities to the humanitarian personnel.[83]

2.9 *Duty to Respect and Protect Civilians*

The principle of sovereignty provides not only rights for the affected State, but also responsibilities towards the civilian population within its territory, and requires that they be respected and protected during armed conflict. This includes, under IHRL, the duty to respect their fundamental human rights[84]

78 AKANDE/GILLARD, Oxford Guidance, p. 31.

79 AKANDE/GILLARD, Oxford Guidance, p. 32 referring to ICRC Commentary on the APs, para 2858.

80 See Chapter 8 2.4.

81 For situations of occupation, similar Article 59 GC IV; Article 70(3) AP I implicitly requires the resepect of relief by stating that relief shall not be diverted.

82 AKANDE/GILLARD, Oxford Guidance, p. 31 and fn. 70; ICRC Study on Customary IHL, Rule 32.

83 See Chapter 8 2.4.

84 STOFFELS, p. 517.

and the obligation to refrain from attacks and other wrongful acts prohibited under IHL and international criminal law. The duty to respect and protect civilians during non-international armed conflict is also a rule of Customary IHL, according to the ICRC Study.[85] A closer look on the rights of the civilians towards the affected State is taken later.[86]

85 ICRC Study on Customary IHL, Rule 32.
86 See Chapter 10 1.

CHAPTER 7

Rights and Duties of Non-state Armed Groups

Since international law was traditionally designed for interaction between States, it has a State-centric approach.[1] In this light, it is uncertain what legal position non-State armed groups can hold under international law.

It is today undisputed that members of an armed group, as individuals, are bound by the rules of international law. This includes, in particular, obligations under IHL and international criminal law.[2] A glance at the work of the ICC reveals that combatants and superior commanders from non-State armed groups represent the majority of defendants at the ICC, while governments are reluctant to surrender members of their own armed forces for international prosecution. On the other hand, members of non-State actors enjoy similar protection to civilians under IHL if they are wounded or are considered as persons *hors de combat*.[3]

In contrast to the individual position of the group members, the rights and duties of an armed group as an entity remain largely unexplored.[4] In order to reflect the scope of the rights and duties of non-State armed groups with respect to the provision of humanitarian relief (2), it is crucial to first determine whether and how armed groups are bound by international law (1).

1 Bound to International Law

As non-State armed groups are not considered by States as entities with international legal personality, they are unable to become parties to relevant international treaties. Thus, they cannot be required to fulfil international obligations under international law as a treaty party within the meaning of Article 26 of the VCLT.[5] However, even if armed groups are not parties to

1 Even though there are other subjects accepted in modern international law, such as international organisations or individuals, they have only partial rights and duties and do not have the same legal capacity as sovereign States, CLAPHAM, Rights and Responsibilities, p. 3 f.

2 Among others, CLAPHAM, Rights and Responsibilities, p. 4; FORTIN, p. 191 f.; KLEFFNER, p. 450; Besides, group members are also subject to the national law, particularly the national criminal law of the state they are fighting against, see also RODENHÄUSER, p. 2.

3 CLAPHAM, Rights and Responsibilities, pp. 4 and 34.

4 KLEFFNER, p. 451.

5 CLAPHAM, Rights and Responsibilities, p. 3 and 6; SFDFA, Normative Framework, p. 17.

the international treaties, it will be shown that they are nevertheless bound by relevant branches of international law, such as IHL (1.1) and IHRL (1.2). Throughspecial commitments, armed groups also have the possibility to explicitly manifest their consent to be bound by certain international obligations (1.3).

1.1 *Bound by IHL*

Today, it is widely accepted that IHL also binds non-State armed groups during armed conflicts.[6] In 2004, the Appeals Chamber of the Sierra Leone Special Court held that

> it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties.[7]

Despite the general acceptance that armed groups are bound by IHL, the legal basis underpinning this application is unsettled.[8] Understanding *how* armed groups are bound by IHL is, however, important for determining which provisions of IHL are binding on non-State armed groups. A solid knowledge of the legal basis is further also relevant in practice in order to engage non-State armed groups in efforts to comply with IHL.[9] The following section will therefore discuss the legal arguments for binding non-State armed groups to IHL. In the doctrine, there are various theories that attempt to explain how armed groups are bound by IHL. They can be divided into arguments for binding armed groups to IHL treaty law (1.1.2) and those for binding them to customary IHL (1.2.2). In this regard, the present book will only outline and discuss the prevailing theories. An analysis of all the different theories would go beyond the scope of this book.[10]

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6 Instead of many, see for example KLEFFNER, pp. 443 f.; RODENHÄUSER, p. 2.

7 Appeals Chamber of the Sierra Leone Special Court, *Prosecutor v. Sam Hinga Norman*, Case No. SCSL 2004 14 AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Decision of 31 May 2004, para. 22; on the overall topic, see CLAPHAM, Rights and Responsibilities, p. 6.

8 Among others, see FORTIN, p. 1787 ff.; KLEFFNER, p. 444; MURRAY, p. 101 f.

9 More on this topic, KLEFFNER, pp. 444 f.

10 For an in-depth discussion on the different theories, it is referred to the pertinent literature, such as KLEFFNER, pp. 443 ff. or FORTIN, Chapter 7, p. 177 ff.

1.1.1 Application of IHL Treaty Law

1.1.1.1 *Intention to Bind Armed Groups*

Some international conventions applicable to non-international armed conflicts clearly express the intention to bind non-State armed groups. For example, Common Article 3 of the GCs provides that "each Party to the conflict" shall be bound by the provisions set out in that article.[11] Since non-international armed conflicts include at least one non-State armed group as a party to the conflict,[12] this wording clearly states the intention of the contracting parties that armed groups should also be bound by the provisions of Common Article 3.[13] Such an underlying intention of Common Article 3 is also generally accepted.[14] However, regarding other instruments, the situation is less clear. For example AP II does not contain any reference which would suggest that it binds also non-State armed groups.[15] However, the *travaux préparatoires* to AP II show that, even though there were divergent views during the drafting debates, most delegations agreed on the fact that AP II should be binding on armed groups.[16] But the expression "parties to the conflict" was removed in the final round of the drafting due to the fear that such an expression could be interpreted as a legal recognition of armed groups.[17] Since the deletion was based on the concern not to afford non-State armed groups recognition, and not because the Protocol was intended to bind States alone, it is concluded in the doctrine, that AP II was nevertheless intended to be applied by both, States and non-State armed groups.[18]

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11 Similiar formulation can also be found for example in Article 19 of the Hague Convention on Culurual Poperty, Article 19; on the overall topic, see SIVAKUMARAN, Non-Internaitonal Armed Conflict, p. 236.

12 SFDFA, Normative Framework, p. 17.

13 Any other reading would also be inconsistent with the statement in Common Article 3 that the application of the provisions shall not affect the legal status of the parties, see SIVAKUMARAN, Binding Armed Opposition Groups, p. 383; see also FORTIN, p. 180. CLAPHAM, Rights and Responsibilities, p. 6.

14 In discussions in the past, the question which was raised in this context was rarely *whether*, but *how* armed groups are bound by the provision of Common Article 3, FORTIN, p. 181 in reference of the ICRC, Commentary to the APs, para. 1345.

15 SIVAKUMARAN, p. 236; FORTIN, p. 181.

16 ICRC, Official Records of the Diplomatic Conference on the Reaffirmation and Developement of International Humanitarian Law applicable in Armed Conflicts (1974–1977), Vol. VII, CDDH/SR.5.1/Annex; for an overview of the comments of the State delegations during the drafting, see CASSESE, Status of Rebels, p. 420 ff.; on the whole, FORTIN, p. 181 ff.

17 ICRC, Commentary on the APs, para. 1339 ff.

18 FORTIN, p. 183; SIVAKUMARAN, Non-International Armed Conflict, p. 236; MOIR, p. 96. This view is further supported by the formulation of the Articles 1 and 2 of AP II, which

Despite evidence of the intention of the drafters of Common Article 3 of the GCs and AP II to bind non-State armed groups, the question remains as to how these treaties purport to legally bind armed groups when they are not parties to the treaties and thus have not consented to be bound by the norms.[19] There was no agreement at the Diplomatic Conference on how exactly armed opposition groups should be bound.[20] Among the many explanations in the doctrine for a direct legal binding of armed groups to IHL treaty law,[21] the two prevailing theories are the doctrines of 'de facto authority' (1.1.1.2) and 'legislative jurisdiction' (1.1.1.3.).[22] According to these theories, armed groups can be bound by IHL treaty law independently of their consent.[23]

1.1.1.2 *Theory of 'De Facto Authority'*[24]

The theory of 'de facto authority' (in contrast to the 'legislative jurisdiction' theory and other theories not discussed here) does not require an intention of the drafters of the treaties to bind armed groups. PICTET considered in his Commentary on GC I in 1952 that an armed opposition group is bound by a convention that it has not signed if the responsible authority at its head exercises effective sovereignty and "claims to represent the country, or part of the country."[25] Recent variations on this view argue that non-State armed groups are bound by treaty law if they constitute *de facto* authorities, which requires that they exercise effective authority[26] (also referred by some as '*de*

provide strong indications on that the drafters considered that armed groups are also bound by the provisions of AP II, see in this respect the arguments provided by FORTIN, p. 183 f.

19 SIVAKUMARAN, Non-International Armed Conflict, p. 238.

20 SIVAKUMARAN, Binding Armed Opposition Groups, p. 383.

21 Other explanations are provided, for example, by the theory of "third parties", which, by analogy with Article 35 of the VCLT, requires that the third party accept the obligations. Further, there is also the theory of "domestic implementation of treaty law", according to which the armed group derive its legal personality and obligations from domestic law (when the State has implemented treaty law), see on this FORTIN, p. 179 ff; SIVAKUMARAN, Non-International Armed Conflict, p. 238 f.

22 There are also other terms used to describe these theories in the doctrine. There are also some variations on these theories. However, the aim here is to identify the common elements of these theories which characterise the argumentation as to why armed groups are legally bound to treaty law.

23 BELLAL/HEFFES, p. 122.

24 This term is particularly used by SIVAKUMARAN, Binding Armed Opposition Groups, p. 379.

25 PICTET, Commentary on the GC I, p. 51.

26 BELLAL, Human Rights Obligations of Armed Non-State Actors, p. 26; see also SCHOISWOHL MICHAEL, 'De facto regimes and human rights obligations – the twilight zone of public international law?' in: Austrian Review of International and European Law,

facto governmental functions') over some territory. This implies that they have at least a relatively stable control over part of a state's territory and/or over persons, in addition to the existence of organs that replace those of the State for the exercise of public power.[27] "Effective control" means that the non-state armed group has established its control and authority over an area to such an extent that it can more than temporarily exclude the state from governing the area.[28] Some authors therefore require for the binding effect of IHL treaty law only that the armed group has 'effective control' over a territory of the State, which is a lower threshold.[29]

As a side note, it should be clarified here that the provided definition of *de facto* authority makes it clear that this theory cannot be applied to all armed groups that may be relevant in the context of humanitarian relief. As noted before,[30] relevant to humanitarian practice are those with territorial control, as well as those groups that do not have a continuing and effective control over a territory, but are present and otherwise relevant for the access to the area in question. That the latter group does not fulfil the requirement of a *de facto* authority (nor the requirement of effective control) is not a major concern in the context of IHL. However, it becomes significant in the context of IHRL whether or not they also have human rights obligations, as it will be shown later.[31]

However, the principles of '*de facto* authority' and 'effective control' do not require that the armed group to explicitly claim to represent the State (in contrast to PICTET), but instead assume that such a claim is implicit in the fact that the armed opposition group exercises *de facto* authority.[32] The explanation behind this theory is that if a government ratifies a treaty, the ratification binds the State and not only the particular ratifying government. Thus, in situations where the government of a State changes, treaties that have already been in force will bind the incoming governments through succession. Thus, the relevant treaty will also bind an armed opposition group if it successfully overthrows the existing government and becomes the new government (even if it has previously rebelled against the government that has ratified the treaty).

Volume 6 (2001), p. 50; and VAN ESSEN JÖRG, 'De Facto Regimes in International Law', in: Utrecht Journal of International and European Law, Volume 74 (2012), pp.31–49.

27 For example, KLEFFFNER, p. 453.

28 BELLAL, p. 29.

29 For example: "bound as a result of controlling territory" by FORTIN, p. 199 ff.; MURRAY, pp. 120 ff. and 131.

30 See Chapter 1 2.3.

31 See Chapter 7 1.2., 1.2.3.

32 See SIVAKUMARAN, Binding Armed Opposition Groups, p. 379 and KLEFFNER, p. 452.

The theory of '*de facto* authority' argues that the binding of the armed group to treaty law should already take place at the stage when an armed opposition group (explicitly or implicitly) claims to be the government and becomes a serious threat to the State, since it will be bound by these norms anyway.[33] To support this view, reference is made to Article 10 of the ILC Draft Articles on State responsibility, which states that the "conduct of an insurrection movement which becomes the new government of a State shall be considered an act of the State under international law." It is pointed out that based on Article 10 of the ILC-Draft Articles on State responsibility, it can be said that armed groups are (retrospectively) bound by the same international norms as the State during the armed conflict.[34]

Although this argument seems plausible at first glance, it is not conclusive from a legal point of view. First of all, if the argumentation is based on the succession that will eventually take place at a later point in time, the theory fails to explain why armed groups who don't become the new government should also be considered to be bound by IHL during the armed conflict.[35] In this respect, the approach of the ILC Draft Article 10 on State Responsibility is more consistent, as it is explicitly limited to situations where armed groups manage to become part of the new government. Further, the application of Article 10 of the ILC Draft Articles on State responsibility does not require that the armed groups have previously claimed to become the new government or that they exercised *de facto* authority at the time when the relevant acts were committed. Thus, a reference to Article 10 of the ILC Draft Articles does not explain why these elements must be met for a binding under the theory of '*de facto* authority'. And (this is the most significant criticism of this theory): even if an armed group successfully becomes the new government of a State, it will be bound by IHL in its new legal personality as a State and not in its old form as an armed group. Thus, the theory of 'succession' does not explain the binding of the armed group as an entity for the duration of the conflict.[36] Also, Article 10 of the ILC Draft Articles on State responsibility refers to the accountability of the new government and not of the former armed group. As FORTIN points out:

> Indeed, the International Law Commission has concluded that the principle in Article 10 can be better explained by the fact that the State

33 FORTIN, p. 199.
34 FORTIN, p. 200.
35 FORTIN, p. 199.
36 FORTIN, p. 199.

> apparatus which emerges at the end of an armed conflict is often, in practical terms, a continuation of both organizations which fought against each other during the armed conflict itself. Taking this into account, it makes sense for the State to be held responsible for the acts not only of the pre-existing government but also of the armed group that not forms part of it. In terms of administration and structures, the post-conflict government is likely to contain core elements of both legal entities.[37]

Article 10 of the ILC Draft Articles on State responsibility is therefore only an explanation for the attribution of an act of a previous armed group to the State and not for the separate liability of the armed group itself. It is similar to the attribution of acts of private actors to the State under Article 9 of the ILC Draft Articles.[38] Just because the actions of these actors are judged by the standards of international obligations does not make them at any point the bearers of those obligations. The relevant obligations (always) remain with the State.[39]

The reason for binding armed groups by virtue of their *de facto* authority is also explained with reference to the principle of effectiveness.[40] It is argued that the principle of effectiveness requires that the legal orders are efficient and valid. In situations where the legal order does no longer correspond to reality, such as when the State is unable to exert effective control over parts of its territory because of the presence of an authority which claims to exercise, or actually exercises, governmental powers, the principle of effectiveness no longer allows the State to be the only bearer of the respective norms of international law. Instead, it is suggested that, by default of the government in such instances, as a pragmatic response, armed groups should be the bearer of those rights and duties.[41] However, as FORTIN states correctly in this regard, while this principle may provide an explanation for why armed groups should be bound by IHRL in such situations (as it will be pointed out later), it is not a suitable explanation for the binding of non-State armed groups to IHL. In

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37 FORTIN, p. 200 in reference to the ILC statement in the ILC Yearbook 1972 Vol. II (n 112) 146, p. 199.

38 Which is also sometimes invoked as an explanaition for binding armed groups to international law, see for example FORTIN, p. 247 ff., whose opinion the author of this book also does not share, for the reasons mentioned before.

39 There is also nothing in the commentaries to these articles that would suggest that the State must take responsibility for these actions, because otherwise these actors cannot be held accountable, but because here the State, within the framework of its own obligations, must allow these actions to be attributed as its own.

40 FORTIN, p. 200, KLEFFNER, p. 451.

41 FORTIN, p. 200 ff.

situations of non-international armed conflict, IHL entails two duty-bearers at the same time: the State and non-State actors, in recognition of the fact that in such circumstances the State alone will not be able to ensure the protection of the civilians.[42] Thus, armed groups are not bound by IHL by default of the State government, but together with the State. This is also true for situations where humanitarian relief is required. As mentioned before, the State's responsibility to provide relief to the civilians in need will remain even in situations where an armed group has *de facto* control over the territory in which the affected civilians are located.[43] At the same time, as it will be outlined later, the non-State armed group will also have the duty to provide respectively enable the provision of relief.[44]

Finally, it should be noted, that the theory of '*de facto* authority' is only applicable to the extent that the non-State armed group claims (at least implicitly) to replace the government and to exercise *de facto* authority.[45] However, it is problematic to make the binding of armed groups to IHL dependent on such factors. Armed groups do not need to have this characteristic in order to be considered as a party to a non-international armed conflict.[46] The situation in which they exercise *de facto* authority will be most likely given when the high threshold for the applicability of Additional Protocol II is met, which many of today's non-State armed groups will not reach. Further, not all armed groups seek to replace the government of a State. At times, armed groups that are parties to an armed conflict may only have an interest to benefit from the general insecurity in the region in order to retain access to economic resources.[47] Thus, the theory of '*de facto* authority' is not able to explain the binding of armed groups to IHL in situations where the requirement of an explicit or implicit claim to represent the State is not met.[48] A more comprehensive approach to binding all armed groups that are party to an armed conflict is provided by the theory of 'legislative jurisdiction.'

42 FORTIN, p. 202.
43 See Chapter 6, 2.3. (2.3.3).
44 See Chapter 7 2.1.
45 HEFFES/FRENKEL, p. 48.
46 See Chapter 1 2.1.
47 KLEFFNER, p. 454, referring to HERFRIED MÜNKLER, Die neuen Kriege, Leipzig 2002, pp. 159–173.
48 KLEFFNER, p. 453; SIVAKUMARAN, Non-International Armed Conflict, p. 239 f.

1.1.1.3 *Theory of 'Legislative Jurisdiction'*

According to the 'legislative jurisdiction' theory, States have on the basis of their sovereignty, similar to legislation at the national level, also at the international level the capacity to enact directly binding laws for individuals subject to their jurisdiction.[49] The 'legislative jurisdiction' theory is an exception to the general principle that individuals can only directly invoke the rights and obligations of an international treaty if the respective State has a monistic legal system and the treaty provision is self-executing. Instead, it proposes that, where there is an intention on the part of the treaty drafters to do so, an international treaty may create rights and obligations that are directly applicable to individuals (irrespective of the legal system and whether or not they have been incorporated into the domestic law of the State).[50] This understanding is supported by the Permanent Court of International Justice's *Advisory Opinion on the Jurisdiction of the Courts of Danzig* of 1928 and, more recently, by the ICJ's Judgement in 2001 in the *Case of LaGrande*. In both cases, the Courts confirmed, by reference to the underlying intention of the contracting parties, on the basis of the terms used in the international agreements in question, that these agreements created direct rights and obligations for the individuals which could be enforced by national courts, even if the provisions had not been incorporated into domestic law.[51]

As outlined before, it was undoubtedly the intention of the drafters of Common Article 3 and AP II to bind non-State armed groups to the IHL treaty law. However, since, according to the theory of 'legislative jurisdiction', States have the power to legislate directly binding laws for *individuals* subject to their jurisdiction, it is argued in the doctrine that this principle derives the binding force of IHL on organised armed groups as collective entities from the binding

49 MURRAY, p. 122, HEFFES/FRENKEL, p. 47; KLEFFNER, p. 445; FORTIN, pp. 187 and 189.

50 FORTIN, p. 187 f.; SIVAKUMARAN, Binding Armed Opposition Groups, p. 383 f.

51 PCIJ, *Advisory Opinon on the Jurisdiction of the Courts of Danzig*, p. 17 f.: "it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the *Beamtenabkommen*." See also ICJ, *LaGrande* (*Germany v. United States*), para. 77: "Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person." On the overall topic see FORTIN, p. 187 f.; SIVAKUMARAN, Binding Armed Opposition Groups, p. 384; SIVAKUMARAN, Non-International Armed Conflict, p. 241 f.

force on their individual members.[52] There are also various statements made in the context of the drafting sessions and conferences of the ICRC which cast doubt on whether the drafters could have intended that armed groups should be bound by IHL by virtue of their constituent members being directly bound by IHL.[53]

To construe the binding force of IHL on organised armed groups (indirectly) by reference to its binding force on their members is problematic. It is based on the assumption that the legal obligations of an armed group are identical to those of its members. A closer look at the provisions of IHL, in particular of AP II, shows that there are several provisions that are addressed to the group as a collective and not to its members.[54] For example, in the context of humanitarian relief, the duty to provide relief (which will be discussed in more detail later)[55] is clearly an obligation that can only be fulfilled by the armed group as a collective and not by individual members.[56] By virtue of their organisational structure, armed groups have a wider functional capacity and a greater power to act than their individual members.[57] As KLEFFNER notes in this regard:

> Parties to an armed conflict are not merely the sum of all its members, who act as atomized individuals. Rather, organized armed groups (just as states parties to an armed conflict) are identifiable entities, with political objectives (broadly conceived) that they pursue by violent means. They possess an organized military force and an authority responsible for

52 As mentioned before, the binding force of IHL on individual natural persons is recognised. Since individuals can be punished for war crimes, it is clear that they bear duties that flow directly from IHL, see KLEFFNER, p. 449.

53 For example, in the preliminary drafting sessions of the GCs, the ICRC included the phrase (which was later deleted): "the High Contracting Parties undertake, in the name of their people, to respect and ensure the respect of the current Convention in all circumstantces." An ICRC member later explained, that the ICRC wanted to include this phrase in order to make it clear that armed groups were bound by IHL by virtue of their consitutent members being directly bound by IHL. Another, similar explanation was given by the ICRC at the Conference for the APs, stating: "[t]he ICRC had always held the view that Article 3 was binding not only the govermments of Contracting States but also on the population as a whole and, hence, on rebel forces." see on this FORTIN, p. 192 f. with reference to the Conference of Government Experts on the Reaffirmation and Developement of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May-12 June 1971, 44, para. 223.

54 KLEFFNER, p. 450 f.; FORTIN, p. 194 f.

55 See Chapter 7 2.1.

56 For other examples, see FORTIN, p. 194 f.; KLEFFNER, p. 451.

57 FORTIN, p. 195.

> its acts, whereas the individual member concerned acts on behalf of an organized armed group.[58]

The more established an armed group becomes, the more its legal obligations increase. Consequently, the obligations of an armed group do not and cannot correspond to the obligations of its members.[59] This implies that the drafters of Common Article 3 and AP II must have intended to directly bind armed groups as an entity. In this regard, FORTIN points out that the ICRC stated during the drafting conferences of APs in 1970 that AP II was based on the same principles as Common Article 3 and that any commitment made by the States should be considered as binding not only the established government but also

> the constituent authorities and all private individuals on the territory of the High Contracting Party concerned.[60]

In its Commentary on AP II, the ICRC stated similiarly that:

> the commitment made by a state not only applies to the government but also to any established authorities and private individuals within the national territory of that state and certain obligations are therefore imposed upon them.[61]

FORTIN argues that the terms "constituent authorities" and "established authorities" do not necessarily have to be understood as referring exclusively to State authorities, but can be interpreted broadly to mean any entity that exercises authority over a population, and thus can include armed groups. FORTIN justifies this interpretation by pointing to several instances where the ICRC has used the terms "authorities" and "constituted authorities" to refer also to non-governmental bodies. FORTIN thus comes to the conclusion that the previously quoted passages of the ICRC can be understood as meaning that in addition to States and private individuals, also armed groups as an authority are directly bound by IHL (and not only by virtue of their individual members).

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58 KLEFFNER, p. 450.

59 FORTIN, p. 195.

60 ICRC, Official Records of the Diplomatic Conference on the Reaffirmation and Developement of International Humanitarian Law applicable in Armed Conflicts (1974–1977), Vol. VIII, 239, para. 55.

61 ICRC Commentary on the APs, para. 162; PICTET, Commentary on the GC II, p, 34. For the whole, see MURRAY, p 122 and HEFFES/FRENKEL, p. 47.

FORTIN further argues that this approach, according to which States may enact binding laws for other non-State actors within their jurisdiction, would be an extension of the 'legislative jurisdiction' theory and a development of the principle expressed in the *Advisory Opinion on the Jurisdiction of the Courts of Danzig*.

The author of this book sees no particular reason why such a broad interpretation of the terms 'authorities' in the quoted Statements of the ICRC is required in the first place, and why an extension of the theory of the 'legislative jurisdiction' must be assumed in order to include the legislation of directly binding norms for non-State armed groups. The term 'individual' is often used in international law in a broad sense. It refers to private actors, who may be natural or legal persons. The aforementioned statements by the ICRC and the 'legislative jurisdiction' theory, which refer to private individuals, can therefore include both natural persons and a collective of natural persons that is sufficiently organised to have legal personality under international law. Even though the courts have so far confirmed the legislative jurisdiction theory only in connection with natural private actors, this does not mean that the 'legislative jurisdiction' theory is limited to these kinds of actors. Such a view seems to be also shared by SIVAKUMARAN, who states in respect of the legislative jurisdiction theory:

> The individuals that are bound by ratification of a treaty on the part of the state are private individuals and collectivities of individuals. The latter encompasses state collectivities, neutral collectivities and individuals forming a collectivity for the purposes of challenging the state.[62]

The theory of 'legislative jurisdiction', in its initial form, without any extension, is therefore capable of explaining the intended direct binding of IHL treaty law on armed opposition groups within the jurisdiction of the State.

However, there is one main criticism that is raised in the doctrine against this theory, which cannot be dismissed: while the theory of 'legislative jurisdiction' can be easily applied for the binding of natural private actors within the jurisdiction of the State, it is not equally unproblematic when it comes to non-State armed groups. From a practical point of view, it will be difficult to convince non-State armed groups to comply with IHL if the explanation for

62 SIVAKUMARAN, Binding Armed Opposition Groups, p. 382.

doing so is based on the fact that the very government they are fighting against has ratified the given rule.[63] KLEFFNER notes in this regard that:

> [t]he equation of members of an organised armed group with 'ordinary citizens', who can reasonably be assumed to be at least receptive to the suggestion that they are bound by the legal rules that the state has accepted or issued, appears to be somewhat strained, if not entirely neglecting the reality of organized armed groups as challengers to the monopoly of force that states arrogate for themselves.

The reasoning via the State therefore bears the risk that it may undermine the acceptance of IHL by non-State armed groups.[64] Nevertheless, among all the theories of the binding of armed groups to IHL treaty law, the 'legislative jurisdiction theory' is considered by the majority of authors to be the most adequate and comprehensive in explaining how armed groups are bound by treaty law.[65] However, in situations where the binding nature of an IHL treaty rule is questioned, the doubt might eventually be removed if the respective rule also constitutes a norm of customary IHL[66] (which is the case today for the most treaty norms, particularly for the provisions of Common Article 3 and most of the provisions of AP II, including Article 18 AP II, as mentioned before).[67]

1.1.2 Application of Customary IHL

In contrast to treaty law, it is now widely accepted that armed groups are bound by the provisions of customary IHL.[68] The aforementioned theory of 'de facto authority' can also be applied as an explanation of how armed groups are bound by customary IHL.[69] Since the shortcomings of this theory outlined before would also exist in relation to customary IHL, it is not a convincing argument here either. It will therefore not be discussed further here. The predominant approach taken in the doctrine to explain the binding nature

63 Among many others, see CASSESE, p. 429; MOIR, p. 53 ff. ZEGVELD, p. 16; KLABBERS, p. 359; KLEFFNER, p. 446.

64 At the same time, there are also few voices in the doctrine which argue that such a risk is rather low, as armed groups also have their own interest in being bound by IHL. See for example, Sivakumaran, p. 242.

65 For example, FORTIN, pp. 198 and 206 f.; MOIR, p. 53 f. with references to other authors holding this view; see also SIVAKUMARAN, Binding Armed Opposition Groups, p. 382.

66 CLAPHAM, p. 10.

67 See Chapter 2 2.2 (2.2.2).

68 MURRAY, p. 124; Sivakumaran, p. 236, both with further references; CLAPHAM, p. 12.

69 FORTIN, p. 207.

of customary IHL is based on the status of armed groups. It is argued that armed groups are bound by customary IHL because they have international legal personality.[70] Considering that legal personality is determined on the basis of the possession of rights and obligations under international law, the explanation provided for the binding nature of customary international law for armed groups appears to be a circular argument, namely that armed groups are bound to rights and obligations under international law because they possess rights and obligations under international law.[71] However, the reasoning behind this theory is better understood by reference to the statement of the Darfur Commission with regard to violations of international law by non-State armed groups during the Darfur conflict:

> insurgents that have reached a certain threshold of organisation, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts.[72]

Thus, armed groups are understood as an entity that is bound by relevant rules of customary IHL in situations of non-international armed conflict when they become sufficiently organised to be treated as an independent legal entity (and party to the conflict) under IHL.[73] FORTIN therefore suggests that the circularity in the explanation of the binding of armed groups to customary IHL could be somewhat avoided if the international legal personality of the armed group is understood not only as an entity's assumption of rights and duties under international law, but as a construct that it is linked (besides the possession of rights and duties) also to the functionality and (thus) to the capacity of that entity to assume rights and duties.[74] Such an understanding also explains why not all armed groups with an international legal personality will be bound by the same provisions of customary IHL, since not all armed groups have the same functionality and capacity. As FORTIN correctly emphasises, customary international law is not a fixed body of law that binds all subjects of international law to the same extent.[75] Armed groups can only be bound by those

70 FORTIN, p. 204; KLEFFNER, p. 454.

71 FORTIN, p. 205.

72 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para. 172.

73 FORTIN, p. 205.

74 FORTIN, p. 206.

75 FORTIN, p. 204.

norms of customary IHL that correspond to their functionality and capacity. Thus, while an armed group with a lower level of organisational structure and capacity will only be bound by the provisions of customary law that correspond to Common Article 3, armed groups with a higher level of organisation and even effective control over a territory will also be bound by the provisions of AP II insofar as they constitute customary law.[76] As a brief comment, it should be mentioned at this point that the actual capacity of the armed group is also relevant for determining the scope of a normative obligation (whether customary or treaty-based).This aspect will be discussed in more detail later in the context of the findings on the specific rights and duties of armed groups.[77]

A particular advantage of this theory (in comparison to the theory of legislative jurisdiction) lies surely in the fact that the binding to IHL does not emanate form the State against which they are fighting, but is the result of the opinio iuris and behaviour of the international community as a whole as to which norm should bind non-State armed groups as well. This argument might be more convincing for armed groups to comply with the rules of IHL.[78] However, since the opinio iuris and practice of armed groups are not taken into account in determining what constitutes the customary law that binds them in situations of non-international armed conflict,[79] the problem of lack of ownership of the regulations will also remain under this theory.[80]

Finally, an explanation of the binding force of customary IHL based on the legal personality of the armed group may give rise to objections from States since they do not acknowledge armed groups as subjects of international law for fear such an acknowledgement might confer legitimacy on organised armed groups. But, as KLEFFNER rightly points out, such a fear confuses legal personality with legitimacy. The fact that a particular entity is considered as a subject of international law does not necessarily confer legitimacy on that entity.[81] The presented approach for binding non-State armed groups to customary IHL rather shows a willingness to accept the reality.[82] Against this background, the question arises as to whether armed groups should be recognised explicitly (not only implicit within the theory for binding them to customary IHL) as

76 FORTIN, p. 206.
77 See Chapter 7 2.
78 FORTIN, p. 206; KLEFFNER, p. 454.
79 The ICRC, in its Study to Customary Law, stated that the practice of organised armed groups "does not constitute State practice as such" and that the legal significance of their practice is as yet unclear, see ICRC, Study of Customary Law, p. xxxvi.
80 CLAPHAM, Rights and Responsiblities, p. 12; Kleffner, p. 454.
81 KLEFFNER, p. 455.
82 With similar arguments, FORTIN, p. 204.

subjects of international law, provided that they have the necessary capacity due to their organisation and functionality. This question will therefore be discussed later under necessary further developments.[83]

1.2 *Bound by IHRL*

In contrast to IHL, the applicability of IHRL to non-state armed groups is highly controversial. The traditional view is that IHRL is only applicable in the relationship between the State and individuals under its jurisdiction, and that it is the State's responsibility to protect its civilian population under national law from human rights violations committed by non-State actors.[84] According to ZEGVELD, human rights norms "are neither intended, nor adequate, to govern armed conflicts between the State and armed opposition group(s)."[85] She further argues that even if IHRL should be binding on armed groups during armed conflicts, the contribution of IHRL would be of little significance as the non-derogable human rights norms are essentially reflected in Common Article 3 and Protocol II. Thus, applying human rights in the context of armed groups during non-international armed conflict would not add any value.[86] In recent years, however, debates have shifted more towards the view that there is a legal necessity to apply IHRL also to non-state armed groups during non-international armed conflicts, and that this does indeed add value to the application of IHL.[87] The following will show why this view is to be supported, particularly with regard to the provision of humanitarian relief.

1.2.1 Applicability of IHRL to Armed Groups

1.2.1.1 *Legal Necessity for Applying IHRL to Armed Groups*

As MURRAY correctly poins out, even if the intention of the drafters of human rights treaties was to regulate exclusively the relations between States and individuals under their jurisdiction, such a limitation cannot be maintained in the light of today's reality. Armed groups increasingly exercise authority over the civilian population, often outside the control of the State. It therefore appears unreasonable for affected civilians to be denied the protection of IHRL simply because the entity to whose authority they are subject is not a State.[88] As mentioned before, the basis of human rights is the inherent dignity

83 See Chapter 22 4.1.

84 CLAPHAM, Rights and Responsibilities, p. 22; RODENHÄUSER, p. 3.

85 ZEGVELD, Accountability, p. 53 f.; on the overall topic concerning opposing voices on the human rights obligation of armed groups, see BELLAL, Direct Responsibility, p. 307.

86 ZEGVELD, Accountability, p. 52 f.

87 For example, GENEVA ACADEMY, In-Brief No. 7, p. 19 ff; FORTIN, p. 27 ff.

88 MURRAY, p. 157.

of the human person.[89] This is, for example, expressed in the Preamble to the Universal Declaration of Human Rights, stating that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[90] And the ICCPR and the ICESCR also affirm that the rights of the Covenants "derive from the the inherent dignity of the human person."[91] Accordingly, the decision when civilians should or should not be protected by IHRL cannot depend on the status of the authority to which they are subject.[92] At the same time, it is important to note, that this should not lead to the understanding that any crime committed by a private entity in situations of armed conflict should be considered as a human rights violation because of the inherent dignity of the persons affected. It must be agreed with RODENHÄUSER that such an understanding would dilute the concept of human rights. It is the primary responsibility of the State to ensure that the human rights of persons under their jurisdiction are respected. Thus, as long as the State is able to protect its civilian population with due diligence under national law from human rights violations by third parties, including irregular armed groups, there is no need to apply IHRL to armed groups.[93] However, in situations where the State has lost its authority over a territory and its population and is therefore no longer able to provide the necessary protection to affected civilians, it is crucial to hold non-State actors to IHRL.[94] Otherwise, victims under the control of non-State armed groups would be left in a legal vacuum.[95]

Further, applying IHRL to non-State armed groups also brings added value regarding IHL. While IHL provides essential protection for civilians through treaty and customary law, it does not cover the full range of harmful acts that a non-State armed group may commit against civilians in situations of armed conflict. In particular, since the main purpose of IHL is to regulate armed conflict and its negative effects on victims, it does not cover violations that are not directly related to the conduct of hostilities.[96] That the specificity of IHRL may provide a higher standard of protection for civilians in certain situations is an argument that has already been made earlier in relation to the application of

89 See Chapter 2 2.4 (2.4.1).
90 Preamble, para. 1, Universal Declaration of Human Rights.
91 Preamble, para. 3, ICCCPR and Preamble, para. 3.
92 On the overall topic, see MURRAY, p. 157 ff.
93 RODENHÄUSER, p. 10.
94 BELLAL, Human Rights Obligations of Armed Non-State Actors, p. 20 f.; RODENHÄUSER, p. 10.
95 MURRAY, p. 159.
96 BELLAL, Human Rights Obligations of Armed Non-State Actors, p. 20.

IHRL in non-international conflicts in general.[97] The application of IHRL to non-State armed groups would further allow this higher standard of protection to be ensured for civilians affected by the actions of non-State armed groups.[98] This is particularly important in situations of humanitarian crisis, as there are many fundamental rights of the affected civilian population under IHRL that are not considered under IHL. Consequently, in the context of the arbitrary withholding of consent to relief operations, the positive obligations that can be breached under IHRL are more far-reaching than those under IHL (as will be shown later).[99]

Finally, since IHL is limited to situations of armed conflict, the application of IHRL to non-State armed groups is particularly important for situations outside of armed conflict.[100] But even in situations of armed conflict, the application and enforcement mechanism of IHRL has a significant role to play in the implementation of IHL obligations in general and in particular with regard to non-State armed groups, since there are no other means of holding armed groups accountable as an entity, as it will be discussed later.[101]

1.2.1.2 *Asserting Practice on Applicability of Human Rights Law to Armed Groups*

The view on the applicability of IHRL to armed groups is now gaining increasing support. Many international organisations, including UN bodies and truth commissions dealing with the actions of non-State actors, have addressed in their statements and reports human rights violations related to armed

97 See Chapter 2 III.

98 FORTIN, p. 61 ff.

99 On possible breaches of IHRL that may result from the arbitrary withholding of consent to relief operations, see Chapter 13 3.; on IHRL obligations in connection with humanitairan relief, see also FORTIN, pp. 59 ff. with further references.

100 For example, the Commission of Inquiry on Syria addressed in February 2012 the responsibility of the Free Syrian Army (FSA) in a situation where the Commission considered that IHL was not yet applicable. Thus, IHRL was the only normative ground on which the wronfulness of its conduct could be assessed. In its report, the Commission therefore stated that "at a minimum, human rights obligations constituting peremptory international law (jus cogens) bind States, individuals and non-State collective entities, including armed groups. Acts violating jus cogens – for instance, torture or enforced disappearances – can never be justified," see Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN GA, A/HRC/19/69, 106, cited in and with further references, BELLAL, Human Rights Obligations of Armed Non-State Actors, pp. 21 f.; see also RODENHÄUSER TILMAN, 'Human Rights Obligations of Non-State Armed Groups in other situations of violence: The Syrian Example', in: International Humanitarian Legal Studies, Volume 3 (2012), pp. 263–290.

101 MURRAY, 122 f.

groups (as it will be outlined in the following discussions).[102] In addition, non-governmental organisations such as Human Rights Watch have increasingly included human rights violations committed by non-State armed actors in their monitoring reports.[103] SIVAKUMARAN further notes that a number of States have also occasionally taken the view that non-State armed groups are bound by IHRL, particularly "when the conflict was taking place for a certain duration and reached a certain intensity."[104]

There are, however, divergent opinions on the legal basis for the application of IHRL to armed groups. The important question today, as BELLAL argues, therefore seems to be not so much "if", but rather "how and which" IHRL obligations can bind non-State actors.[105]

1.2.2 Application of IHRL Treaties to Armed Groups

1.2.2.1 *Intention to Bind Armed Groups?*

Since it is doubtful that the drafters of IHRL treaties intended to bind armed groups, the majority of authors in the doctrine seem to deny that armed groups can be bound by human rights treaties and consider customary IHRL as the only source of law that binds armed groups.[106] FORTIN comes in her comprehensive review of armed groups and IHRL treaty law to the conclusion that there is indeed nothing in the *travaux prépartoires* of the major IHRL treaties,

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102 For example, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/34/54, 17 February 2017, paras 44–48; Report of the Commission on Human Rights in South Sudan, A/HRC/40/69, 21 February 2019, para 96; see also MURRAY, p. 159 with further references; CLAPHAM, Rights and Responsibilities, pp. 24 and 27 with further references; AKANDE/GILLARD, Oxford Guidance, p. 12 with fn. 17 with further references or an overview of the practice of the UN Securtiy Council and General Assembly, see BURNISKE JESSICA S./MODIRZADEH NAZ K./ LEWIS DUSTIN A., 'Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the U.N. Security Council and U.N. General Assembly,' Harvard Law School Program on International Law & Armed Conflict, June 2017, online available at https://dash.harvard.edu/handle/1/33117816 (last visited, 31 August 2023).

103 For example, Huma Rights Watch Reports: 'You'll learn not to Cry: Child Combatants in Colombia (2003)'; 'No Exit: Human Rights Abuses Inside the MKO Camps (2005)'; 'A Face and a Name: Civilian Victims of Insurgent Groups in Iraq (2005)'; 'A Question of Security: Violence against Palestinian Women and Girls, (2006)'; 'The Christmas Massacres: LRA Attacks on Civilians in Norther Congo (2009)'; 'Paramilitaries Heirs: The New Face of Violence in Colombia (2010)', for more information, see CLAPHAM, Rights and Responsibilities, p. 32.

104 SIVAKUMARAN, Non-International Armed Conflict, p. 97; see on this Murray, p. 159 with further references.

105 BELLAL, Direct Responsibility, p. 307.

106 For example, ZEGVELD, p. 38 ff; see on this FORTIN, p. 209.

such as the ICCPR, ICESCR and CAT, that would indicate that the drafters of these treaties intended to bind non-State armed groups. She further shows that this interpretation is supported by the practice of the relevant treaty bodies. Nevertheless, she finds that these treaties demonstrate support for the idea that non-State armed actors can be subject to human rights obligations in general. And that the practice of the treaty bodies also constitutes an implicit recognition that non-State actors can be bound by human rights law outside the treaty framework, such as customary IHL or domestic law.[107]

Apart from the aforementioned IHRL treaties, FORTIN also examines the two human rights treaties that are said to contain obligations of armed groups in situations of armed conflict, namely the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention).[108] Of particular interest in the context of humanitarian relief operations is the Kampala Convention, which explicitly states in Article 7(5)(c) and (g) that *members of armed groups* (emphasis added) shall be prohibited from "[d]enying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter" and from "[i]mpeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons." However, based on the wording '*members of armed groups*', it is argued in the doctrine that the drafters may have intended to bind only the members and not the armed groups themselves.[109] In this context, FORTIN mentions several references in the Convention to armed groups as such, which (together with the press releases and explanations issued) can be taken as indications that there was indeed an intention to bind armed groups as entities with Article 7(5).[110] She further suggests that it is also arguable that the drafters intended armed groups to be bound by their members.[111] However, FORTIN finally comes to the conclusion that, due to the ambiguities contained in the treaty, the intention to directly bind armed groups as an entity to human rights treaty norms remains controversial even under this treaty.[112]

107 FORTIN, p. 210 ff. with references to relevant documents underpinning the practice of the treaty bodies.
108 FORTIN, p. 226 ff.
109 FORTIN, p. 234 with further references.
110 FORTIN, p. 236 with further references.
111 FORTIN, p. 238.
112 FORTIN, p. 239.

1.2.2.2 *Theory of 'De Facto Authority'*

Given the absence of an intention to bind armed groups in (at least major) IHRL treaties, the theory of 'de facto authority' is considered as a possible ground to explain the application of IHRL treaty law to armed groups. The characteristics of this theory have already been outlined before, and reference is therefore made to those explanations.[113] While this theory has shown difficulties in explaining the binding of non-State armed groups to IHL, these aspects do not pose any particular constraints in connection with the application of IHRL. Instead, the principle of effectiveness underlying this theory provides an accurate explanation for the binding of armed groups to IHRL. Namely, in instances where an armed group exercises '*de facto* authority' by exercising governmental functions or de facto control over part of the State's territory and population, it is difficulat, if not impossible, for the government of the State to protect the human rights of the affected civilian population in that territory.[114] Unlike IHL, therefore, the application of IHRL obligations to armed groups is required 'in default' of the government.[115] Furthermore, the binding of armed groups to a State's treaty-based IHRL obligations when they exercise '*de facto* authority', including control over territory and persons, can also be explained on the basis of the view that human rights treaties devolve with territory and are owned by the population in that territory. Such a view is held, for example, by the Human Rights Committee, which has stated that:

> The rights enshrined in the Covenant belong to the people living in the territory of the State party (...) once the people are accorded the protection of the rights under Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party.[116]

Even though this view is not universally accepted, it contributes convincing arguments.[117] It is particularly in line with the widely accepted argument, that human rights are inherent in the dignity of every human person. With regard to the theory of '*de facto* authority', the suggested linking of human rights to

113 See Chapter 7 1.1. (1.1.1.2).

114 FORTIN, p. 343.

115 In the argumentation on applying Article 9 ILC-Draft Articles on State responsibility to non-State armed groups referred to by FORTIN, p. 272.

116 UN HRC, General Comment No. 26: Continuity of Obligations, 12 August 1997, UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, para. 4; hereto FORTIN, p. 274 f. with further references.

117 See FORTIN, p. 275 f.

persons and territory would, in contrast to IHL, explain the automatic transfer of the State's obligations under the theory of '*de facto* authority'. According to such an understanding, the succession of obligations takes already place with the exercise of *de facto* control over the territory and persons to whom the rights belong and does not depend on a subsequent success of the armed group.[118]

1.2.3 Application of Customary IHRL

Given that there is little evidence that IHRL treaties are binding on armed groups, in practice the vast majority accept that customary law is the source of law for the human rights obligations of armed groups.[119] The theory of '*de facto* authority' is the one that is most frequently referred to in practice by the various UN organs and bodies (including the Security Council, the Human Rights Council, human rights treaty bodies, and bodies of special procedures and fact-finding missions) for holding armed groups accountable under customary IHRL.[120] The characteristics of this theory and why it is particularly suitable to explain the binding of armed groups to IHRL have already been outlined before with regard to the binding of armed groups to IHRL treaty law. The same arguments also apply to the binding of customary IHRL, namely that the armed group exercising de facto authority through effective control over territory or persons and exercising governmental functions must, in view of the principle of effectiveness, be bound by customary IHRL by default of the affected State in order to provide an effective protection and respect for the human rights of the affected civilian population. Furthermore, it can also be argued that they are bound by customary IHRL by de facto succession of the State's obligations, since these IHRL provisions are attached to the territory and persons under their control.[121]

UN bodies rarely use the term '*de facto* authority' in their statements or reports to justify the binding of armed groups to customary IHRL, but rather refer to the constitutive elements, namely that armed groups must respect IHRL when they exercise state governmental functions or have de facto control over a territory and population of the State. For example, in March 2011, the Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka stated:

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118 See also FORTIN, p. 275.

119 Seealso, FORTIN, p. 323.

120 For an overview, see FORTIN, p. 335 ff.

121 See, Chapter 7 1.2, 1.2.2 (1.2.2.2).

> [w]ith respect to the LTTE, although non-state actors cannot formally become party to a human rights treaty, it is now increasingly accepted that non-state groups exercising de facto control over a part of a State's territory must respect fundamental human rights of persons in that territory.[122]

The Independent International Commission of Inquiry of the Syrian Arab Republic cited in its Report of August 2012 the Sri Lankan report, stating:

> [although] non-state actors cannot formally become parties to international human rights treaties (…) [t]hey must nevertheless respect the fundamental human rights of persons forming customary international law, in areas where such actors exercise de facto control.[123]

The OHCHR has also repeatedly stated that

> non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.[124]

As FORTIN points out, the key element that is often referred to is the control of territory. However, this is then taken as a reason enough to apply human rights law to the armed group without any further explanation. FORTIN notes that there is no explicit analysis of whether the armed group is organised enough to be considered as a separate legal entity under international law. Nor is there any discussion of whether the armed group actually controls territory and to what extent, or whether the conditions for a governmental function are met. FORTIN therefore rightly concludes that although there is a large body of practice affirming that armed groups can be bound by customary IHRL, there has been little contribution to a better understanding or development of when the necessary elements for binding customary law are met.[125]

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122 UN SG, Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011.

123 UN HRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 15 August 2012, UN Doc. A/HRC/21/50, para. 47.

124 For example, OHCHR, Report of the High Commissioner for Human Rights on the implementation of Human Rights Council resolution 7/1, UN Doc. A/HRC/8/17, 6 June 2008, para. 9; see also BELLAL, Human Rights Obligations of Armed Non-State, p. 26 with further references.

125 FORTIN, p. 343 ff.

In situations, where an armed group did not have control over territory, the binding of armed groups to customary IHRL has been justified by UN bodies based on the fact that the relevant norms are peremptory norms (ius cogens).[126] For example, the Commission on Inquiry on Syria used this argument in the early stages of the crises in Syria, where non-State armed groups defended their villages or neighbourhoods against State forces without exercising control over territory or persons. It stated:

> [h]uman rights obligations constituting peremptory international law (ius cogens) bind States, individuals and non-State collective entities.[127]

This understanding is considered problematic for two reasons: first, there is no exhaustive list of human rights that constitute a peremptory norm. Thus, it is not always certain whether non-State armed groups without territorial control are bound by a human rights obligation. Second, there is no legal basis which would explain why all entities shall be bound by all norms of ius cogens.[128] Nevertheless, it seems appropriate to bind also armed groups without territorial control to certain human rights, since Common Article 3 of GCs, which is applicable in conflicts where armed groups do not have territorial control, also explicitly requires the respect for the right to life and dignity of civilians. In this light, and also on the basis of the view that human rights are first and foremost entitlements of individuals which are inherent in the dignity of every human being, it seems consequent to the author of the present book to require that also armed groups without territorial control or *de facto* authority shall be bound to fundamental human rights obligations which correspondent at least to the ones mentioned in Common Article 3 to the GCs.[129] Thus, in order to determine the IHRL obligations to which armed groups relevant to the provisions of relief actions are bound, it has to be distinguished whether they exercise de facto authority and have control over territory and persons, or whether they have no such authority and control. In the latter case, they may nevertheless breach the right to life and human dignity of the affected civilians by withholding of consent to relief operations.

126 For definition of peremptory norms, see Article 53 VCLT.

127 UN HRC, Report of the Independent International Commission on Inquiry on the Syrian Arab Republic, 22 Feburary 2012, UN Doc A/HRC/19/69, para. 122.

128 FORTIN, p. 346 f.

129 See on the overall topic, RODENHÄUSER, p. 7.

1.3 *Special Commitments by Non-state Armed Groups*

Uncertainty about the extent to which armed groups are bound by international law, as well as their own interest in engaging with international rules, has led to the possibility of special commitments, which can reaffirm existing legal obligations or impose further obligations on the armed group in question. In this regard, non-State actors can express commitments to international law through special agreements (1.3.1), codes of conduct (1.3.2), unilateral declarations (1.3.3), or in a recent development, through so-called Deed of Commitments promoted by the NGO Geneva Call (1.3.4).[130] Practice has shown that non-State armed groups are keen to make use of such instruments.[131]

1.3.1 Special Agreements

Special agreements commonly exist between non-State armed groups and States[132] or UN entities.[133] These types of agreements are encouraged by Common Article 3 of the Geneva Conventions, which stipulates that "Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention."[134] In many of these special agreements, the parties do not agree on new obligations, but rather "reaffirm" their existing obligations under international law.[135]

Special agreements are rare, as they are often signed with the fear of implicit legitimisation of the armed group. Examples of successful agreements with armed groups can be found in Sudan, where the SLM/A (Sudan Liberation Movement/Army) and JEM (Justice and Equality Movement) have some internationally binding agreements with the government. The NMRD (National

130 See, for example, CLAMPHAM, p. 23; JACKSON, p. 4.

131 HEFFES/FRENKEL, p. 54 with further references.

132 For example, Agreement on the Civilian Protection Component of the International Monitoring Team between the Government of the Republic of the Philippines and the International Monitoring Team, Oct. 27, 2009, http://peacemaker.un.org/philippines-agreemen-cpc2009; Agreement on a Permanent Ceasefire between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Feb. 23, 2008, available at https://peacemaker.un.org/uganda-permanent-ceasefire2008 (last visited 31 August 2023).

133 For example, Memorandum of Understanding between the Government of Sudan, the SPLM and the UN regarding UN Mine Action Support to Sudan, Sept. 19, 2002, available at https://reliefweb.int/report/sudan/memorandum-understanding-between-govt-sudan-splm-and-un-regarding-un-mine-action (last visited 31 August 2023).

134 On the overall topic, see CLAPHAM, Rights and Responsibilities, p. 19.

135 WORSTER, p. 234.

Movement for Recovery and Development) has also concluded two agreements with the Government of Sudan, including one on humanitarian access.[136]

1.3.2 Codes of Conduct

Codes of Conduct are regulations by non-State armed groups to shape the behaviour of their members by translating their international obligations into an internally workable list and by addressing the genuine humanitarian issues for an armed group on the ground. Such codes can be developed unilaterally by armed groups or initiated and supported by international actors.[137]

Codes of Conduct are the most common internal regulations. There are also other possible instruments that can be used by an armed group to regulate its actions, for example oaths, standing or operational orders, military manuals, internal organisational documents, or internal penal codes.[138]

1.3.3 Unilateral Declarations

Non-State armed groups also have the possibility to make unilateral declarations and commitments at international level. Unilateral declarations, also referred to as "declarations of intent," have often a general content, such as an agreement to respect humanitarian law or to comply with the Geneva Conventions and Additional Protocols.[139] The next step after such a declaration is therefore the development of a Code of Conduct.[140]

Even if a unilateral declaration is made only for political reasons, it can still have a positive outcome. For example, the declaration to act in accordance with an international treaty is of considerable relevance to encouraging compliance with those promises, especially if the relevant treaty does not include the notion of armed groups as addressees of the provision.[141] Unilateral declarations have been made in the past by various armed groups, often triggered when a specific agreement with the other party could not be reacheded and the armed groups are concerned about their public image and reputation. The difficulty with unilateral declarations is the question of who might act as a depositary for the declarations. In the recent past, the NGO Geneva Call has

136 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, para. 174.

137 BANGERTER, p. 10 ff.; SASSÒLI, The Implementation of IHL, p. 64. On the overall topic, see CLAPHAM, Rights and Responsibilities, p. 20.

138 More hereto, see BANGERTER, p. 9 ff.

139 CLAPHAM, Rights and Responsibilities, p. 20.

140 ICRC, p. 22; SASSÒLI, The Implementation of IHL, p. 64, on the overall topic, see Clapham, p. 20.

141 CLAPHAM, Rights and Responsibilities, p. 19 f.

promoted unilateral declarations with various armed groups, with the Canton of Geneva acting as depositary.[142]

1.3.4 Deeds of Commitment and Geneva Call

Deeds of Commitment are pre-formulated unilateral declarations which can be signed by non-State actors to express to the international community their commitment to specific humanitarian and human rights obligations, with reference to certain international treaties. Deeds of Commitment are promoted by Geneva Call, a neutral and impartial NGO, founded in 2000 and based (as its name indicates) in Geneva, Switzerland.[143] To date, there are three Deeds of Commitment: the "Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action," "the Deed of Commitment for the Protection of Children from the Effects of Armed Conflict," and the "Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination."

Geneva Call is in dialogue with around 100 non-State armed groups, and more than half of them have signed one or more Deeds of Commitment.[144] The Deeds are signed by the leadership of the respective armed group and countersigned by Geneva Call and the Government of the Canton of Geneva. The signed documents are then deposited with the Canton of Geneva, which assumes the role as custodian of all signed Deeds of Commitment.[145] Geneva Call provides monitoring and implementation support in order to verify and ensure that non-State armed groups put their commitments into practice, and encourages the non-State actors to integrate these norms into their internal Codes of Conduct.[146]

Geneva Call has not yet developed a Deed of Commitment for humanitarian relief. But in 2016, it has published a study which presents and analyses the perceptions of armed non-State actors on humanitarian action in order

142 University of Oxford, Background Paper, p. 5 f.

143 Jackson, Geneva Call Study, p. 4.

144 Amount of non-State armed groups which singed the Deeds: 52 have signed the Deed of Commitment banning AP mines, 26 the Deed of Commitment protecting children in armed conflict, and 24 the Deed of Commitment prohibiting sexual violence and gender discrimination; available at https://www.genevacall.org/deed-of-commitments/ (last visited 31 August 2023); see also Jackson, Geneva Call Study, p. 4.

145 For more information, see the website of Geneva Call, https://www.genevacall.org/areas-of-intervention/ (last visited 31 August 2023).

146 Jackson, Geneva Call Study, p. 4; Bellal, Direct Responsibility, p. 315; See also Bongard/Somer, p. 673 ff.

to understand their motivations and perspectives, which is essential to enable effective and realistic engagement with such actors and to ensure access to the civilians in need. The study was also a response by Geneva Call to the fact that non-State actors were not included in the consultation process for the UN Secretary-General's first World Humanitarian Summit (WHS), which brought together all key stakeholders in humanitarian relief actions today. Geneva Call tried to fill this gap and contribute to a better understanding of non-State armed groups, who play an integral role in facilitating or obstructing humanitarian relief operations in non-international armed conflicts. To this end, Geneva Call consulted 19 non-State armed groups in 11 countries between June 2015 and February 2016. Despite the diversity of the consulted armed groups, the study could prove a high degree of consistency in many of the views expressed by armed groups on issues related to humanitarian action and access.[147] Relevant findings of the study will be discussed later in the context of the different rights and duties of non-State armed groups, to underscore how those legal provisions are perceived by the armed groups.

2 Rights and Duties

2.1 *Obligation to Provide Humanitarian Relief*

The obligation to provide humanitarian relief is not only based on the principle of sovereignty, but, as mentioned before, can also be derived from obligations of IHRL, particularly from the obligation to respect and ensure the right to life of civilians. Since all armed groups are bound by fundamental obligations of IHRL, such as the right to life, respect for which is also explicitly mentioned in Common Article 3 of the GCs, which applies to armed groups during non-international armed conflicts, it is evident that they also have a duty to meet the needs of the civilian population and to provide humanitarian relief during non-international armed conflicts.[148]

However, the content of this duty may vary depending on the circumstances and the capacity of the concerned armed group. As the affected State has the primary obligation to meet the needs of the civilian population on its territory, even if the State does not have effective territorial control, armed groups

147 JACKSON, Geneva Call Study, p. 5.

148 Presenting similar view, but with different argumentations, AKANDE/GILLARD, Oxford Guidance, p. 12 f.

must in the first instance respect the relief provided by the affected State.[149] Where the affected State is unable or unwilling to provide relief in the relevant areas,[150] the duty to provide relief requires that armed groups either provide the necessary assistance themselves in place of the affected State. This presupposes that they have territorial control or otherwise impact on the access to civilians, and also have the material resources for implementing the required relief.[151] Where armed groups are unable to do so, they must, like the affected State, enable the provision of relief from international humanitarian actors. The latter duty – like that of the affected State – is shaped by different rights and duties.

2.2 *Requirement of Consent*

As mentioned before, when relief is to be provided in territory under the control of an armed group, or where an armed group has otherwise influence over access to the territory, in practice humanitarian actos will also seek the consent of these groups. The acceptance and tolerance of relief operations by these groups is inevitable for a safe and effective delivery of relief. From a legal point of view, however, it is argued that the consent of the armed groups is not required for relief actions, as Art. 18 para. 2 of AP II only requires the consent of the High Contracting Party, which is the affected State party, and not non-State armed groups. Further, it is argued that *de facto* control over a territory does not confer on armed groups a right to non-interference under international law.[152]

Although such an understanding is comprehensible from the perspective of sovereign States that are unwilling to give armed groups the power to decide over their territory, it is legally contradictory and unrealistic to expect armed groups to enable international relief provisions and at the same time not to grant them any rights in return. Provisions relating to armed conflicts must be practicable in order to be effective. As SASSÒLI rightly pointed out:

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149 It would be unrealistic, in the context of an armed conflict, to require armed groups, as opposing parties, to cooperate with the affected State with regard to relief actions and to provide relief actions jointly with the State. In contrast, the obligation to respect, as a mainly negative obligation, is considered in doctrine as a duty that can be fulfilled by any non-State armed group in all circumstances and regardless of its capacity.

150 On the subsidarity, see AKANDE/GILLARD, Oxford Guidance, p. 12 f.; STOFFELS, p. 520.

151 According to discussions with practioners, in practice armed groups have often the capability to provide relief actions; on requirement of territorial control, AKANDE/GILLARD, Oxford Guidance.

152 RYNGAERT, Humanitarian Assistance, p. 7 ff.

> (U)nrealistic rules do not protect anyone but rather tend to undermine the willingness to respect even the realistic rules of IHL.[153]

Legal regulations in the context of armed conflicts will only be respected by armed groups if they enable (and continue to enable) them to wage war and oppose effectively.[154] Therefore, in order to maintain their military position in the conflict, armed groups also require – with regard to relief provisions – the right to decide who may enter the territory which is under their control or in which they otherwise have a considerable presence. Thus, even if the existing legal regulations do not provide any rights to armed groups in this regard, it is crucial for safety reasons and for the effectiveness of legal obligations to adopt a legal understanding that the consent of armed groups that have territorial control or otherwise impact on access to a territory is required for the provision of relief.[155]

2.3 *Obligation Not to Withhold Consent on Arbitrary Grounds*

It is important to note that the requirement of consent to relief actions by non-state armed groups does not mean that they are given the right to act arbitrarily. The interests and protection of the civilian population will remain at the centre of the law applicable during armed conflict. With regard to the primary duty of these armed groups, namely to provide humanitarian relief, they have – similarly to the affected State – an obligation not to withhold consent for arbitrary reasons.[156] Geneva Call's studay outlines that the understanding that consent to relief actions should not be arbitrarily withheld, is also widely accepted by armed groups.[157]

2.4 *Obligation to Allow and Facilitate Relief Actions*

The obligation to provide humanitarian relief further implies that armed groups (like the affected State) must allow and facilitate the rapid and unimpeded passage of international humanitarian relief operations. This requires that they take all possible measures within their capacity to enable and facilitate the provision of relief.[158] The obligation to allow and facilitate is, according to the ICRC Study, a customary rule.[159] It is reflected in various UN Security

153 Sassòli / Shany, p. 427.
154 Sassòli / Shany, p. 427; Sassòli/Olson, p. 622 f.
155 Similar argumentation, Van den Herik/Jägers/Werner, cavv Advisory Report, p. 19.
156 Ryngaert, Humanitarian Assistance, p. 7.
157 Jackson, Geneva Call Study, p. 5.
158 Akande/Gillard, Oxford Guidance, p. 26; ICRC Study on Customary IHL, Rule 55.
159 ICRC Study on Customary IHL, Rule 55.

Council Resolutions as a duty of all parties to a conflict, and the Council has even explicitly reiterated that armed opposition groups are in any event under an obligation to allow and facilitate humanitarian relief.[160]

While this same obligation means for the affected State to facilitate or remove formal measures such as visa obligations,[161] for armed groups it requires them to refrain from imposing unnecessary informal instruments such as entry fees to the territory they control. Depending on the organisational capacity of the armed group, this duty may also require active support for the implementation and distribution of relief.[162]

2.5 *Right to Prescribe Technical Arrangements and Restrict*

Armed groups with a significant presence in a territory (by means of territorial control or other influence on access to the territory), also require, as a counterpart to the obligation to allow and facilitate relief actions, the right to prescribe modalities for the provision of relief, such as technical arrangements or restrictions on the movement of the humanitarian actors, in order to maintain their position and resilience in the conflict. With regard to the limits of such modalities, it can be referred to what has been said before in relation to the affected State.[163]

2.6 *Obligation to Respect and Protect Humanitarian Actors, Relief Consignments and Civilians*

Based on Common Article 3 of the GCs, customary IHL and fundamental IHRL, to which armed groups are bound, it can be concluded that armed groups, as parties to a conflict similar to the affected State, have a duty to respect and protect humanitarian actors, relief consignments and civilians. It can be referred to what has been said before in this regard for the affected State.[164]

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160 For example UN SC Resolution 2139 (2014), 2134 (2014) and 2093 (2013); on the overall topic, see VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 19; see also the ICRC Study on Customary IHL, Rule 55.

161 AKANDE/GILLARD, Oxford Guidance, p. 26.

162 AKANDE/GILLARD, Oxford Guidance, p. 26 f.

163 AKANDE/GILLARD, Oxford Guidance, p. 28.

164 See Chapter 6 2.9; To mention is this regard, that armed groups will be solely bound to general provisions on respect and protection. Particular contracts between humanitarian actors and the affected State on additional privileges have to be considered as bilateral arrangements without further binding effects for armed groups.

CHAPTER 8

Rights and Duties of Humanitarian Actors

Depending on the legal character of the humanitarian actors, some of their rights and duties can vary. For example, the rules of public international law, namely those to respect the State's sovereignty and territorial integrity, bind only those humanitarian actors with international legal personality such as third States or international organisations. In contrast, as private actors, NGOs must also respect the national law of the State in whose territory they operate.[1] Despite these differences, as humanitarian actors they all must meet the same humanitarian principles (1). Also, the relevant rights and duties in connection with the provision of relief are similar for all humanitarian actors (2). This has to be particularly emphasised for NGOs with regard to IHL. Even though they are neither subject to international law nor party to IHL treaties, they are nevertheless humanitarian actors providing relief actions in situations of armed conflict. The capacity of IHL to bind non-State actors in situations of armed conflict has already been outlined in relation to non-State armed groups. These arguments are also used for NGOs in the doctrine, indicating that customary IHL also binds non-State actors and that IHL treaties bind them by reason of their activity on the territory of a contracting party.[2] NGOs are therefore bound by the same rights and duties under IHL as other humanitarian actors.

1 Adherence to Humanitarian Principles

The humanitarian principles assure that the sole purpose of relief actions is to alleviate suffering and not to interfere politically or militarily in an existing conflict. Humanitarian actors are bound to humanitarian principles. Even though these principles do not represent legally enforceable obligations, adherence to them is presumed in the legal requirements to relief operations and are also widely recognised.[3] The study by Geneva Call on the perceptions of armed groups shows that the non-State armed groups consulted in the scope of that study are also broadly familiar with the core humanitarian principles, and that there is a direct link between the integrity and acceptance

1 Akande/Gillard, Oxford Guidance, para. 9.
2 Barrat, p. 231 f, with further references.
3 For non-international armed conflict: Article 18(2) AP II.

of humanitarian assistance and the humanitarian organisations' adherence to the humanitarian principles. Humanitarian actors who are doubted to respect these principles therefore often experience that their provisions are rejected or attacked.[4] Adherence to the humanitarian principles, however, is not achieved by expressing good intentions to deliver humanitarian action in a principled manner, but must be demonstrated and verified by the actions and organisational structure of humanitarian actors.[5] In order to avoid misunderstandings on the conflict parties' side, it is therefore necessary that humanitarian actors carefully monitor and manage their compliance with these principles.[6]

As mentioned before, today there is consensus on four core humanitarian principles such as humanity (1.1), impartiality (1.2), independence (1.3) and neutrality (1.4). To what extent these principles can and should be respected is, however, still controversial. While the principles of humanity and impartiality have been accepted to be substantive principles, the principles of neutrality and independence are seen as tools to effectively apply the previous principles in the political context and are more challenging to employ. Concerning the principle of neutrality, it is particularly questioned if it includes a strict confidentiality and the prohibition not to denounce crimes witnessed.[7]

1.1 *Humanity*

The principle of humanity requires that the assistance be provided for no other purpose than to meet the needs of the people concerned.[8] Humanitarian relief must therefore be offered only for this purpose, free from political opinions, religious beliefs or the pursuit of profit, and must not be used to gather sensitive political or military information.[9]

1.2 *Impartiality*

The principle of impartiality is based on the criteria of non-discrimination and proportionality.[10] Relief actions are provided impartially if they are conducted without adverse distinction on grounds such as race, religion, or political opinion.[11] However, this does however not exclude that priority may be given to the

4 Jackson, Geneva Call Study, p. 5 f.
5 Schenkenberg van Mierop, p. 300.
6 Jackson, Geneva Call Study, p. 6.
7 Schenkenberg van Mierop, p. 296.
8 Akande/Gillard, Oxford Guidance, p. 9.
9 Van den Herik/Jägers/Werner, cavv Advisory Report, p. 9.
10 Van den Herik/Jägers/Werner, cavv Advisory Report, p. 9.
11 gc iv, Article 27.

ones in the greatest need and particular vulnerable categories of people such as children and expectant or nursing mothers or people with disabilities.[12]

In the context of medical care in non-international conflict, the principle of impartiality is explicitly mentioned in Article 7 (2) AP II which states that in the provision of medical care no adverse distinction may be made on grounds other than medical ones. This means that grounds such as gender, race, nationality, religion, or affiliation to a party to the conflict shall not be used to distinguish between the wounded and the sick, and only medical grounds may justify who is most in need.[13]

1.3 *Independence*

The principle of independence requires humanitarian actors to be autonomous from the political, economic, military, or other objectives of other actors in armed conflict, and to be able to freely determine their actions and resist any interference that might divert their course.[14]

Absolute independence is, however, difficult to achieve for humanitarian actors, who, in order to provide relief in an effective and safe way, have to coordinate and cooperate with other actors in armed conflicts who may pursue their own interests.[15] Not to get politically manipulated or used by other actors is therefore, as mentioned before, one of the biggest challenges and dilemmas for humanitarian actors. For example, governments of other States always want humanitarian relief actions to fit in with their priorities. This is also true for the affected State. And when cooperating with non-State armed groups, humanitarian actions run the risk of being used as propaganda by the armed group. In this environment, it is difficult for humanitarian actors to act fully independent of other actors' interests and interference.[16] Further, international humanitarian organisations are always influenced by the political opinions of their

12 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 9; AKANDE/GILLARD, Oxford Guidance, para. 8.; Further, see Article 70 (1) of AP I prohibiting adverse distinctions, which explicitly states that persons with specific needs, such as children, expectant mothers, maternity cases, and nursing mothers, may receive privileged treatment or special protection. This list is not exhaustive, other categories of people may also need special treatment depending on the situation such as wounded, sick, or aged civilians, or persons with disabilities. See Commentary on the APs, para. 2821; SFDFA, Normative Framework, pp. 26 f.; PICTET, The Fundamental Principles of the Red Cross, 18 ff.

13 AKANDE/GILLARD, Oxford Guidance, p. 33.

14 OCHA, Humanitarian Principles, p. 1; VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 9, fn. 6.

15 SCHENKENBERG VAN MIEROP, p. 308.

16 In detail, see SCHENKENBERG VAN MIEROP, p. 308 ff.

member States and are therefore political actors in the first place.[17] Even non-State armed groups recognise that geopolitical concerns, funding, and other factors can challenge the ability of humanitarian actors to be independent in practice. The focus in this regard is therefore rather on the externally observed behaviour of the humanitarian actors than, for example, on where the funding comes from.[18]

1.4 *Neutrality*

The principle of neutrality was defined in the context of the foundation of the ICRC. The principle of neutrality requires that humanitarian actors do not take any side during hostilities or engage in controversies.[19] This particularly requires refrainning from acts that may be harmful to a party to the conflict. This includes sharing information of a military nature of one conflict party which may create an advantage for the opposing party.[20]

As denunciation of crimes by humanitarian organisations may jeopardise the safety and actions of relief organisations on the ground, the ICRC has adopted a rather strict interpretation of the principle of neutrality, which particularly includes confidentiality of what they experience in the context of their work. Confidentiality is seen by the ICRC as a key factor for obtaining the best possible access to the victims of armed conflicts or other situations of violence.[21] The ICRC therefore refrains from taking a position on the methods of warfare and from publicly denouncing the crimes of the parties to the conflict, in order to maintain the confidence of the parties to the conflict and to preserve its access to the people in need.[22] In contrast to ICRC, the large majority of relief organisations delivering humanitarian support define neutrality solely as the requirement to refrain from military involvements, but do not preclude from stating their own position. For example, MSF sees denouncement of severe crimes committed by conflict parties even as a humanitarian responsibility which is not excluded by the principle of neutrality. According to MSF, it is the duty of humanitarian actors to identify and report any obstacles, impediments or prohibitions imposed on their relief activities or to denounce situations in

17 Schenkenberg van Mierop, pp. 299 and 308.
18 Jackson, Geneva Call Study, p. 5.
19 OCHA, Humanitarian Principles, p. 1; Van den Herik/Jägers/Werner, CAVV Advisory Report, p. 9.
20 Schenkenberg van Mierop, p. 297; Akande/Gillard, Oxford Guidance, p. 31.
21 ICRC Guideline on action, 2. Principal mode of action: bilateral and confidential representations, p. 395.
22 Von Pilar, p. 35; also, Sivakumaran, Non-International Armed Conflict, p. 471 f.

which aid activities are diverted from their intended purposes. Particularly in cases of genocide or acts of extermination, MSF argues that silence may not be appropriate for humanitarian organisations in view of the severity of the crimes committed against population. The desire to speak out was also one of the reasons why the founder of MSF split from the ICRC.[23]

However, the positions of humanitarian actors on neutrality and confidentiality have converged over time. In few instances, confidential reports of the ICRC have been leaked unintentionally and the ICRC has subsequently noticed positive changes in the behaviour of the wrongfully acting party.[24] This led, within the ICRC to discussions about changing its position on confidentiality. Although it was decided that the ICRC would keep confidentiality as its working method, it was made clear that neutrality did not have to mean absolute and unconditional confidentiality and silence. The ICRC has therefore started to make occasional public pronouncements. The particular demarche of the ICRC in situations of violations of IHL will be outlined in detail later.[25]

Whereas the ICRC has become more open to public messages, MSF on the other hand has shown more reservation on certain occasions as it has repeatedly been confronted with travel bans from countries that have had undesirable security and operational consequences for speaking out.[26] Today, there is a general consensus that the issue of neutrality must be viewed from an operational perspective and assessed through its real impact on protecting the populations concerned. In view of the responsibility of the international community to assure respect of IHL, a reaction of humanitarian actors on serious violations of IHL cannot be seen as a breach of the principle of neutrality. In other words, the principle of neutrality does not impose assurance of confidentiality with regard to grave violations of IHL. At the same time, acting on this view should nevertheless create a one-sided public political controversy. It is therefore suggested in the doctrine that denunciations should always take the behaviour of both conflict parties into account, and that public messages should be based on factual data and first-hand witnesses.[27]

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23 On the overall topic, see VON PILAR, p. 35.

24 For example, during the Algerian war of independence an ICRC report outlining the torture of Algerians committed by the French got leaked. The following media reporting led to a change in behaviour on the side of the French; see FORSYTHE, p. 60; SIVAKUMARAN, Non-International Armed Conflict, p. 472.

25 See Chapter 17 2.1.

26 WEISMANN, p. 196; on the overall topic, see SCHENKENBERG VAN MIEROP, p. 302.

27 SFDFA, p. 153, SCHENKENBERG VAN MIEROP, p. 302.

However, depending on the political background or power of an organisation, there are different approaches to public denunciation. For example, in practice, politically less independent organisations are more likely to pass on the information they have about serious abuses in confidence to more independent and powerful NGOs, who can then make the information public without revealing its source and jeopardising the safety of their organisation and their workers in the field. And on the basis of this public naming and shaming, further legal action may become possible for the politically dependent organisations.[28]

2 Rights and Duties

2.1 *Right and Duty to Perform Relief Actions*

International law does not explicitly mention that the international community has an obligation with regard to humanitarian relief in another country. But Articles 55 and 56 of the Charter of the United Nations pledge member States to cooperate in the promotion of universal respect for, and observance of, human rights. Based on that, Article 2(1) of the ICESCR provides that parties undertake steps towards the progressive realisation of economic, social, and cultural rights. This aspect is further highlighted in some provisions of the ICESCR such as in Article 11, where parties recognise the essential importance of international cooperation for the progressive realisation of the right to an adequate standard of living.[29] The Committee on Economic, Social and Cultural Rights has considered on a number of occasions the extent of this undertaking in relation to humanitarian relief operations and has noted in its General Comment 12 on the right to adequate food, that "state parties should take steps to respect the enjoyment of the rights to food in other countries, to protect that rights, to facilitated access to food and to provide the necessary aid when required."[30] It further added that in accordance with the UN Charter parties to the ICESCR have an individual and joint responsibility to cooperate in the provision of humanitarian assistance in times of emergency. Based on that, States

28 See Chapter 17 2.2.

29 AKANDE/GILLARD, Oxford Guidance, S. 46; CESCR General Comment No. 12: The Right to Adequate Food (Art. 11), para 36 and 38. The Committee made similar statements in relation to the right to water in CESCR General Comment No. 15: Right to Water (Arts. 11 and 12 of the Covenant), paras 30–34; and to the right to health in CESC General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), para 39.

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

have a responsibility to act in situations of humanitarian emergency in another country, either by performing as humanitarian actors through national organisations or as members of an international relief organisation.[31]

Even though this obligation concerns States, it does not exclude private actors such as NGOs from engaging in relief actions. NGOs may provide relief operations, but in contrast to States they do not have a duty but a right to act in situations of emergency. Also, the ICRC, which has a special mandate to provide relief operations, enjoys a right to humanitarian initiative and not an obligation.[32]

2.2 *Right to Offer and Duty to Respect the Requirement of Consent*

If the responsible conflict party is unable or unwilling to meet the needs of the affected civilian population, according to Common Art. 3 (2) of GCs and Article 18(2) AP II humanitarian actors have the right to offer the conduct of relief operations.[33] As mentioned before, humanitarian actors must offer to provide relief in a principled manner and they have the right to make an offer to the affected State as well as non-State armed groups without provoking any effects on the legal status of the armed group. Further, an offer may not be considered as an interference or unfriendly act against the affected State.

The right to offer relief does not also include a right to actually provide relief actions. As outlined before, the entrance and provision of humanitarian actors requires the consent of the conflict parties, which must be respected by all actors seeking to conduct humanitarian relief operations. The Oxford Guidance questions if NGOs also have an international obligation to respect the requirement of consent, as they are private actors and therefore not bound by the principle of sovereignty and territorial integrity.[34] Indeed, the requirement

31 On the overall topic, see AKANDE/GILLARD, Oxford Guidance, para. 129.

32 For example, at the Diplomatic Conference of 1949 to the Geneva Conventions, it was suggested with regard to Article 3 that the wording 'may offer' its services be replaced by 'shall be requested to furnish' its services. This was rejected at the time by the delegate of the ICRC as such a mandatory clause would jeopardise the independent nature of the ICRC, Final Record, Vol II-B, 95 (ICRC); see SIVAKUMARAN, Non-International Armed Conflict, p. 469.

33 AKANDE/GILLARD, Oxford Guidance, p. 15 with further references.

34 The Oxford Guidance distinguishes the possible breaches of international law as providing relief without consent between the different status of the humanitarian actors. It is argued that while IHL and IHRL address the question of when and how humanitarian relief operations are to be conducted, general principles of public international law such as the principle of sovereignty and territorial integrity would come into play for determining the lawfulness of provision of relief without consent. Based on that, the Guidance stipulates that the lawfulness of humanitarian relief operations conducted without the

of consent of the affected State is also based on the State's right to sovereignty and territorial integrity, which, as rules of public international law, should only be respected by States and international organisations. But as outlined before, the requirement of consent from the conflict parties is also based on IHL.[35] Since all humanitarian actors seeking to provide relief during armed conflicts must comply with the relevant rules of IHL, there is no doubt according to the view of the present book, that they have all, including NGOs, also based on IHL an international obligation to respect the requirement of consent.

The conflict party's right to withhold consent signifies that it is the party's decision to choose if and which humanitarian actor shall provide relief. This is, however, questioned when consent is withheld arbitrarily. Here it is argued whether an entitlement to the provision of relief can be claimed and if humanitarian relief can be provided without the consent of the conflict party concerned. This question will be discussed in more detail later.[36]

2.3 *Duty to Respect the Prescribed Arrangements and Restrictions*

In accordance to the right of the conflict parties to prescribe technical arrangements and restrictions on the provision of humanitarian relief, the humanitarian actors, on the other side, have to respect those limitations.[37] According to Article 71(4) AP I, humanitarian relief personnel participating in humanitarian relief operations may under no circumstances exceed the terms of their humanitarian mission. This includes taking account of the given security requirements and limitations such as specific routes and schedules for the delivery of relief. As a customary norm, this applies also in situations of non-international armed conflict.

A failure of humanitarian actors to comply with the limiting conditions may lead to the termination of the mission of the specific humanitarian actor and not necessarily that the consent to the entire operation would be withdrawn.[38]

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consent may vary depending on the status of the actor implementing them as only States and international organisations must comply with the rules of public international law on sovereignty and territorial integrity. NGOs, as private actors, are not directly bound by these rules and conducting humanitarian relief operations by NGOs without the consent of the relevant states will therefore not necessarily be a violation of international law. It may nevertheless violate the national law of the relevant states; see AKANDE/GILLARD, Oxford Guidance, p. 51. The present book does not fully agree with this view.

35 It is explicitly mentioned in the Geneva Conventions, namely in Common Article 3(2) of the GCs and Art. 18(2) AP II for non-international armed conflicts.

36 See Chapter 17 1.

37 AKANDE/GILLARD, Oxford Guidance, p. 31; ICRC Study on Customary IHL, Rule 55.

38 On the overall topic, see AKANDE/GILLARD, Oxford Guidance, p. 31.

2.4 *Right to Respect and Protection*

For an efficient provision of humanitarian relief, the respect and protection of humanitarian personnel and consignments are crucial. As mentioned before, the conflict parties are obliged to provide such security to relief personnel (2.4.1.) and their consignments (2.4.2.)

It should be noted, that humanitarian actors enjoy protection as relief providing actors only as long as they act lawfully. This is mentioned for non-international armed conflict in relation to medical units and transports in Article 11(2) AP II as "(t)he protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function."

The lawfulness of relief is doubtful where relief is provided without consent of the respective conflict parties. On the other hand, it is questionable if an arbitrary withholding may constitute a prohibited diversion of relief consignments. These questions will be examined later under the relevant section.

2.4.1 Protection of Humanitarian Personnel

Humanitarian personnel participating in relief operations are in the first-place civilians, and they rely on the protection and safety standards applicable to civilian population under IHL. This requires that they shall not be directly attacked or experience other forms of violence or be taken hostage.[39] Intentional attacks against civilians are war crimes in international and non-international armed conflicts under the Rome Statute of the International Criminal Court.[40] The rules on protection of civilians will be discussed in detail later. The application of the general principles of humanitarian law, particularly the principle of distinction, necessity and proportionality, require respect and protection of humanitarian personnel and consignments.[41]

Further, there are various provisions in the GCs and APs specific to medical personnel.[42] Besides, Article 71(2) AP I generally requires that the humanitarian personnel shall be respected and protected by the parties to an armed conflict. Such a provision is not included for non-international armed conflicts in Additional Protocol II, but as the requirement of protection of humanitarian

39 AKANDE/GILLARD, Oxford Guidance, para. 78.

40 AKANDE/GILLARD, Oxford Guidance, para. 79, referring to Article 8(2)(b)(iii) of the Rome Statute of the ICC. Also of relevance is the war crime of intentionally directing attacks against individual civilians not taking direct part in hostilities, Articles 8(2)(b)(i) and 8(2)(e)(i) Rome Statute of the ICC.

41 SFDFA, Normative Framework, p. 27 ff.

42 For example, Article 9 AP II.

personnel in armed conflicts represents a universal *opino iuris* and practice, it is part of international customary law according to the ICRC's Study and obviously also applies to conflict situations of a non-international nature.[43] The UN General Assembly has in several resolutions urged States to take the necessary measures to ensure the safety and security of humanitarian personnel in general during non-international armed conflicts.[44] The protection of humanitarian actors is finally also reinforced through other international conventions such as, for example, the Rome Statute, which prohibits attacks against personnel involved in humanitarian assistance in international and non-international armed conflicts and considers such attacks as war crimes.[45]

Specific rules relevant to medical humanitarian relief operations are more detailed and may go above the general rule applicable to the protection of humanitarian personnel.[46] For example Article 9(1) AP II provides that medical personnel shall be respected and protected and shall not be compelled to carry tasks that are not compatible with their humanitarian mission. Article 10(1) AP II further states that under no circumstances should any person be punished for having carried out medical activities compatible with medical ethics. Thus, no medical personnel shall be harassed, harmed, prosecuted, convicted or punished for medical provision, regardless of the nationality, religion, status or affiliation with the party to the conflict of the person receiving such care. This rule covers all forms of medical assistance and care (treatment, diagnosis, basic first aid) provided to the wounded and sick.[47]

Beside the provisions in the law, States often have specific contracts with humanitarian actors concerning further protection to humanitarian personnel. For example, the Convention on the Privileges and Immunities of the United Nations of 1996 and the Convention on the Privileges and Immunities of the Specialised Agencies of 1947 contains detailed provisions on safety, privileges and immunities, providing full freedom of movement and judicial immunities to UN officials and Member State representatives. Also, the ICRC enjoys further privileges and immunities which are established by bilateral agreements between the ICRC and countries where they have permanent or operational presence. Such agreements are negotiated in bilateral and confidential

43 ICRC Study, Rule 56.

44 For example UN GA Resolutions 62/95 (2007), paras. 3 and 18; 59/211 (2004); on this topic, see SFDFA, p. 20 with further references.

45 Art. 8 (II) Rome Statute.

46 AKANDE/GILLARD, Oxford Guidance, p. 33.

47 AKANDE/GILLARD, Oxford Guidance, p. 33.

dialogues and often cover to a large extent the same privileges and immunities as those granted to the UN.[48]

2.4.2 Protection of Humanitarian Relief Consignments

Similar to the protection and safety of humanitarian personnel, supplies, vehicles and equipment involved in humanitarian relief operations are in the first place considered as civil objects and are consequently entitled to the same protection as other civil objects under IHL.[49] It is particularly prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population such as foodstuff or drinking water. This rule is set forth in Article 14 AP II for non-international armed conflicts and has been also established as the norm of customary IHL.[50]

The protection of relief consignments is specifically mentioned in the Additional Protocol I for international armed conflicts. According to Article 70(4) AP I, for example, relief consignments must be protected by the parties to an armed conflict.[51] According to Article 70(3)(c) AP I, parties to an armed conflict must refrain from diverting, as well as actively preventing the diversion of relief supplies. This includes a prohibition on the destruction and looting of relief consignments, and requires clear instructions in this regard to all persons acting in this matter, an effective investigation of allegations of looting, destruction, or diversion, and, finally, that those found responsible are held accountable.[52]

For non-international armed conflicts, there is no similar general reference to humanitarian relief supplies and equipment, but Article 11(1) AP II explicitly mentions that medical units and transports shall be respected and protected, and not attacked. Further, the general protection of humanitarian relief supplies and equipment in the sense of AP I constitutes, according to the ICRC Study a rule of customary law as the protection of relief personnel and is therefore also applicable in non-international armed conflicts.[53] The protection and safety of relief consignments is further also required by the Rome Statute: "intentional direct attacks against installations, material, units or vehicles involved in a humanitarian assistance mission, as long as they are entitled to the protection given to civilian objects under international

48 On the overall topic, see DEBUF, p. 331 ff.
49 AKANDE/GILLARD, Oxford Guidance, p. 31.
50 ICRC Study on Customary IHL, Rule 54.
51 AKANDE/GILLARD, Oxford Guidance, p. 32.
52 AKANDE/GILLARD, Oxford Guidance, p. 32.
53 ICRC Study on Customary IHL, Rule 32.

humanitarian law," are according to Article 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute of the ICC considered as a war crime in international as well as in non-international conflicts.[54]

54 AKANDE/GILLARD, Oxford Guidance, p. 32.

CHAPTER 9

Rights and Duties of Non-belligerent States

Non-belligerent States may be directly affected by humanitarian relief operations intended for the civilian population of the affected State, if the relief operations are initiated on their territory or must pass through their territory in order to be carried out on the territory of the affected State. This will be the case in situations where the direct delivery of relief on the territory of the affected State is difficult or impossible, including situations where the affected State arbitrarily withholds its consent to relief operations. This primarily concerns non-belligerent States that are neighbouring countries of the affected State.[1] In this role, the non-belligerent States have similar obligations and rights as the affected State with regard to the entrance and transfer of relief convoys and goods on their territories. Yet, the scope of these provisions is limited given their duty to cooperate.

1 Cooperation with Humanitarian Actors

As already mentioned before under humanitarian actors' rights, States have an individual and joint responsibility to cooperate in the provision of humanitarian assistance in times of emergency in order to promote the respect and progressive realisation of human rights in accordance with the ICESCR. This implies that in situations where relief to the affected State can be only provided when it is initiated on or transited through the territory of a non-belligerent State, the State also has the duty to cooperate with the external humanitarian actors in order to enable the provision of relief to the civilian population in the affected State.[2] The content of this duty to cooperate is shaped by the following rights and duties of the non-belligerent States.[3]

1 AKANDE/GILLARD, Oxford Guidance, pp. 38 and 46.

2 AKANDE/GILLARD, Oxford Guidance, p. 46.

3 In contrast to the affected State, there is no requirement for special protection of the humanitarian actors and consignments, as non-belligerent States have no active fighting and no interest in endangering relief provisions on their territory.

2 Rights and Duties

2.1 *Requirement of Consent and Right to Withhold Consent*

In view of the sovereignty of non-belligerent States it is evident that the consent of non-belligerent States is always required when relief actions have to be initiated on or transit through their territory. There is, however, a divergence of views in the doctrine if non-belligerent States are under an absolute obligation to consent or if they also have a right to withhold that consent.[4]

For situations of international armed conflicts, the Oxford Guidance argues that the consent of non-belligerent States on whose territory the humanitarian relief action is initiated or will transit is always required and that they have a right to withhold this consent.[5] This interpretation is based on Article 70(1) of AP I which requires "the agreement of the Parties concerned in such relief actions."[6] The expression "Parties concerned" is understood as a reference not only to the conflict State parties on whose territory the humanitarian relief operation will be conducted, but also to all other States concerned by the operations, which may also include non-belligerent States where relief is undertaken or where relief consignments will pass.[7] Further, the requirement of agreement is understood for non-belligerent State similar to the affected State also as a right to withhold that consent.[8] With this view, the Oxford Guidance contradicts the interpretation of others in the doctrine, that Article 70(1) AP I refers exclusively to States parties to the armed conflict and that all other States are covered only by Article 70(2) AP I, which does not refer to consent, but requires that each High Contracting Party has to "allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and

4 AKANDE/GILLARD, Oxford Guidance, p. 38 with regard to international armed conflicts. Even though the Oxford Guidance does not explicitly say so for non-international armed conflicts, it can be assumed for non-international armed conflicts with regard to the sovereign rights of the non-belligerent State; the requirement of consent and the freedom to withhold consent of the non-belligerent State have to be clearly differentiated, as the first concerns the question of whether the State has to be requested or if its consent can be assumed because of certain circumstances, and the second concerns whether there is an obligation to give consent or not. But in view of the sovereign right of a non-belligerent State, the requirement of consent is evident, even if it is not explicitly mentioned in the law in connection with the requirement of consent. Rather, the question is if the non-mentioning of the subject of agreement can be interpreted as there is an absolute obligation to agree.

5 AKANDE/GILLARD, Oxford Guidance, p. 39 f.

6 AKANDE/GILLARD, Oxford Guidance, p. 38.

7 AKANDE/GILLARD, Oxford Guidance, p. 39 f.

8 Implicitly AKANDE/GILLARD, Oxford Guidance, p. 39 f.

personnel."[9] This interpretation implies that all non-belligerent States have an absolute obligation to give consent to relief actions, particularly to the passage according to paragraph 2.[10]

The Oxford Guidance also disagree with the view of the ICRC Commentary to AP I that "Parties concerned" by humanitarian relief in the sense of Article 70(1) AP I are the party to the conflict in whose territory the operations will be conducted and non-belligerent State from whose territory the relief operations are initiated. Non-belligerent States that only have a transit function could not fall under paragraph 1 because the tansit of relief supplies is explicitly mentioned in paragraph 2 of Article 70.[11] This approach leads to a distinction between non-belligerent States on which territory relief is initiated and where relief only passes through. It implies that the first category has the freedom to withhold the consent to initiation while the latter is under an absolute obligation to agree to the passage of relief.[12]

The position of the Oxford Guidance with regard to the consent of non-belligerent States in international armed conflict is convincing for several reasons. First and foremost, its interpretation of the word "concerned" is also supported by the understanding given to this expression in other Articles of the GCs.[13] Further, this view keeps the basic elements of the principle of territorial sovereignty which entitles States to have the freedom to regulate all activities carried out on their territory, requiring not only their consent but also providing the freedom to withhold that consent. It is also contradictory to apply paragraph 2 of Article 70 AP I to the requirement of the initial consent of

9 AKANDE/GILLARD, Oxford Guidance, p. 39 refers only to an absolut obligation to agree with passage, but consequently it also has to be applied for initiation if both types are considered to be covered by paragraph 2 only.

10 The Oxford Guidance mentions only the second implication, see AKANDE/GILLARD, Oxford Guidance, p. 39.

11 AKANDE/GILLARD, Oxford Guidance, p. 39; ICRC Commentary on the APs, paras 2806–2807 and 2824–2825.

12 AKANDE/GILLARD, Oxford Guidance, p. 39.

13 AKANDE/GILLARD, Oxford Guidance, p. 39 f. referring to the view that parties "concerned" in humanitarian relief operations include all of the States mentioned. This is supported by the interpretation given to the expression "concerned" in Article 9 GC II, Article 9 GC III, and Article 10 GC IV. It is stated that "the Parties concerned must be taken to mean those upon which the possibility of carrying out the action contemplated depends. For example, when consignments of relief are forwarded, it is necessary to obtain the consent on only of the State to which they are being sent, but also of the State from which they come, of the countries through which they pass in transit and, if they have to pass through a blockade, of the powers which control the blockade." See, for example, ICRC Commentary on GC I, para 58.

non-belligerent States while for the affected State the duty to allow and facilitate relief is clearly distinguished from the initial consent.[14] And as the affected State has to give its initial consent to relief irrespective whether relief will be conducted on or only transit through its territory, there is also no reason for a distinction between non-belligerent States where relief operations are initiated and those where relief is transited. In both cases, external relief agencies enter the territory of a sovereign, non-belligerent State, and they require its initial consent, the granting of which is within the sovereign power of the non-belligerent State.[15]

Unfortunately, the Oxford Guidance does not maintain a similar view with regard to the consent of non-belligerent State for relief actions in non-international armed conflict. Based on the fact that Article 18(2) of AP II requires the consent of "the High Contracting Party concerned" in a singular form, it concludes that the position of non-belligerent States is not addressed in AP I, as it is unlikely that this term could include non-belligerent States, since there would be more than one non-belligerent State concerned with particular humanitarian relief operations. Based on that, the Oxford Guidance states that non-belligerent States are free to regulate under their national law the question of whether and under which circumstances their consent may be required for initiation or passage of humanitarian relief actions.[16]

Even though the view of the Oxford Guidance on non-belligerent States in non-international armed conflict is understandable from a grammatical interpretation of the provision in Article 18 AP II, there is no founded reason for a differentiation between the status of non-belligerent State in international and non-international armed conflicts. It is therefore argued that, notwithstanding the fact that Article 18 AP II does not address non-belligerent States, respect for their sovereignty, even in situations of non-international armed conflict, requires their prior consent to the provision of assistance on or through their territory and gives them the right to withhold such consent. A regulation on this matter at the national level is therefore not necessary and would lead to unwanted different divergences of national positions.

14 See 6 2.4.

15 AKANDE/GILLARD, Oxford Guidance, p. 39 f.

16 AKANDE/GILLARD, Oxford Guidance, p. 41.

2.2 *Obligation Not to Withhold Consent on Arbitrary Grounds*

Non-belligerent States have in view of their duty to cooperate no right to withhold consent for initiation or transit of relief operations on arbitrary grounds.[17] Since they enjoy the possibility to withhold consent based on their sovereignty and right to control, similar to the conflict parties, the arbitrariness of their withholding can be determined on the same criteria as for the conflict parties.[18] However, it should be noted in this regard that non-belligerent State might be entitled to withhold consent in fewer situations than the conflict parties as they have no military concerns for the limitation on the entrance of external actors on their territory.[19]

2.3 *Obligation to Allow and Facilitate*

For international armed conflicts, Article 70(2) AP I explicitly states that relief shall be allowed, including a rapid and unimpeded passage facilitated by conflict parties as well as "each High Contracting Party" which include non-belligerent States.[20] For non-international armed conflicts, there is no such reference. A similar provision was included in the draft of AP II by the Committee at the Diplomatic Conference, but it was then deleted in the last moment as part of the revisions that were made with the aim to adopt a simplified text.[21]

However, it can be argued that a duty to allow and facilitate relief actions exits for non-belligerent States for situations of non-international armed conflict as part of their duty to cooperate.[22] This understanding also correspond to the practice of the UN entities. For example, in 1994 during the genocide in Rwanda, the Security Council called upon States that were bordering Rwanda "to facilitate transfer of goods and supplies to meet the needs of the displaced persons within Rwanda."[23] According to a resolution adopted in 2000 by the UN Security Council on the protection of civilians in armed conflicts, "all parties

17 Without mentioning the ground, but also saying that they are not allowed to withhold consent arbitrarily, AKANDE/GILLARD, Oxford Guidance, p. 41.

18 if (i) it is withheld in circumstances that result in violation by non-belligerent States to their obligations under international law with respect to the civilian population in question; or (ii) the withholding of consent violates the principles of necessity and proportionality; or (iii) consent is withheld in manner that is unreasonable, unjust, lacking in predictability, or that is otherwise inappropriate; see AKANDE/GILLARD, Oxford Guidance, p. 41.

19 AKANDE/GILLARD, Oxford Guidance, p. 41.

20 AKANDE/GILLARD, Oxford Guidance, p. 44.

21 Draft AP II, Article 33(2), para. 657; see in ICRC Study on Customary IHL, Rule 55.

22 AKANDE/GILLARD, Oxford Guidance, p. 44 f.

23 UN SC, Statement by the President of the Security Council, p. 2.

concerned, including neighbouring States need to cooperate fully" in the provision of access to humanitarian personnel.[24] In addition, the Guiding principles on Humanitarian Assistance which were adopted by the UN General Assembly in 1991 underline that "States in proximity to emergencies are urged to participate closely with the affected countries in international efforts, with a view to facilitating, to the extent possible the transit of humanitarian assistance."[25]

Measures that can be applied to accelerate the process of entrance and enable a rapid and unimpeded passage are similar to the ones which are available for the affected State, such as waiving or simplifying visa requirements, expediting customs procedures or levying entry and exit taxes. However, as non-belligerent States have fewer security concerns, it can be expected that compared to conflict parties they adopt less onerous procedures and that relief may pass more simply and swiftly through their territories.[26]

2.4 *Right to Prescribe Technical Arrangements*

According to Article 70(3) AP I, conflict parties as well as other contracting parties like non-belligerent States on whose territory humanitarian relief will be initiated and will transit are entitled to prescribe technical arrangements for the passage of humanitarian relief supplies, equipment, and personnel.[27]

Even though this issue is not addressed in relation to non-international armed conflicts in the Geneva Conventions, it is reasonable to assume that the right to sovereignty may provide non-belligerent States with certain control over the passage of external actors and entitle them to prescribe technical arrangements. These arrangements can be similar to those applied by the parties to a conflict, such as the screening of relief consignments and the imposition of specific routes, and must be applied in good faith and should not unnecessarily impede the rapid delivery of relief.[28]

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24 UN SC Resolution 1296 (2000), para. 666.

25 UN GA Resolution 46/182, para. 668; for the overall topic, see ICRC Study on Customary IHL, Rule 55.

26 AKANDE/GILLARD, Oxford Guidance, p. 44.

27 AKANDE/GILLARD, Oxford Guidance, p. 45.

28 AKANDE/GILLARD, Oxford Guidance, p. 45 f.

CHAPTER 10

Rights and Duties of Civilians

1 Right to Respect and Protection

As indicated before, the conflict parties have in situations of armed conflicts the obligation to respect and protect civilians. As well as the obligations to protect civilians against dangers a rising from military operations and not to attack them (Article 13 and 14 AP II),[1] this also included the duty to protect and respect the fundamental human rights of the affected civilian population. Situations of humanitarian crisis require respecting the right to life, food, essential medications, sanitation, adequate accommodation, clothing, as well as equality and non-discrimination. The prohibition of inhuman and cruel treatment and torture is also relevant. Those rights are enshrined primarily in international and regional human rights treaties. References to those human rights can be also found in IHL, for example in Common Article 3(1) of the GCs and Article 4 AP II which state for situations of non-international armed conflict that all persons not taking direct part in hostilities shall be treated humanely and that life, health, dignity as well as physical and mental integrity shall be respected without distinction.[2] Besides, civilians are also protected by the Rome Statute, which prohibits inhuman and cruel treatment and torture but also names murder, starvation (a new amendment adopted also includes situations of non-international armed conflict) or collective punishments as war crimes. The use of starvation as a method of warfare is also prohibited under IHL, namely in Article 14 AP II for non-international armed conflicts. The content of those rights and prohibitions will be outlined later under possible breaches of international obligations of the concerned State through the withholding of consent.[3] The protection and respect of civilians requires that the conflict parties do not take any measures that violate one of the mentioned rights or constitute a prohibited act. Where civilians do not anymore enjoy a

1 STOFFELS, p. 517, this protection is only provided as long as civilians are not taking directly part in hostilities. Article 13(3) AP II.

2 Article 4(2)(a) AP II: "Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: violence to the life, health and physical or mental well-being of persons."

3 See Chapter 13 4.

certain human right, conflict parties are further obliged to take active measures in order to enable the enjoyment of that right. With respect to the fulfilment, this is to say that the human rights embodied in the ICCPR like right to life require immediate respect, while so called social rights of CESCR such as the right to food or medical supplies may, according to the Committee on Economic, Social and Cultural Rights, be achieved progressively towards full realisation. Nevertheless, social rights oblige taking immediate steps towards the final goal.[4]

2 A Right to Receive Humanitarian Relief?

Although conflict parties have, in situations of humanitarian crisis during non-international armed conflict, the duty to provide relief either by themselves or by enabling relief actions and must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, it is questionable if civilians enjoy *in versus* an enforceable right to receive such relief.

IHL provides for situations of occupations in Article 62 of the GC IV that "(s)ubject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them." Civilians therefore enjoy under the regime of occupation a right to receive humanitarian relief.[5] A similar provision, however, can't be found for situations of non-international armed conflict in the GCs or AP II. Although Article 5(1) (c) of AP II states, in relation to persons deprived of their liberty, that "they shall be allowed to receive individual or collective relief"and Article 7(2) AP II provides that the sick and wounded "shall receive, to the fullest extent practicable and with the least possible delay, the medical care

4 The Committee on Economic, Social and Cultural Rights stated in its General Comment No. 3 (1990) on the nature of States parties' obligations that "while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant" (para. 2). Moreover, the Committee indicated that the progressive realization of economic, social and cultural rights "differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the [International] Covenant [on Economic, Social and Cultural Rights] should not be misinterpreted as depriving the obligation of all meaningful content," para. 9; on the overall topic, see, OHCHR, p. 17 f.

5 RYNGAERT, Humanitarian Assistance, p. 6.

and attention required by their condition," those provisions are not considered by all in the doctrine as sources of an enforceable right of civilians to receive humanitarian relief. Accordingly, some voices in the doctrine argue that there is no right for civilians to receive assistance, but that the legal standards created by the (before mentioned) human rights such as the right to food, life, health, etc. would enable an equal enforcement to receive relief provision.[6]

According to the prevailing views in the doctrine, however, the essentiality of humanitarian assistance for the people in need[7] and the respective recognitions in practice,[8] IHRL provides for the affected civilians a so-called solidarity human right to humanitarian assistance as part of international customary law. It is justified, that even though none of the major international or regional human rights treaties refers expressly to humanitarian relief as a human right, the Convention on the Right of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) nevertheless make explicit references to humanitarian assistance with regard to refugees and internally displaced persons in connection with the enjoyment of the child's human rights.[9] Further, the UN Guiding Principles on Strengthening the coordination of humanitarian emergency assistance of the United Nations are also seen as an acknowledgement of such a right in practice.[10] Most of the non-State armed groups recognise humanitarian access in their Code of Conducts as a right of the affected civilian population: for instance, a study by the Netherlands Quarterly of Human Rights on several Codes of Conducts of armed groups in different countries such as Afghanistan, Democratic Republic of the Congo, and Sudan revealed that those groups mention in their Codes the beneficiaries of humanitarian aid and state that they enjoy the right to basic needs and they shall receive humanitarian assistance without discrimination and according to those basic needs as well as the right to effective human rights protection.[11] A Study by Geneva Call on the perception of armed groups on humanitarian actions also confirms that the consulted groups expressed overwhelmingly positive attitudes on humanitarian access for the affected civilian population.[12]

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6 For example, KUIJT: "An independent human right to receive assistance may currently be developing, indeed, providing humanitarian assistance may already be the substantial fulfilment of a state's obligation to ensure a person's right to life, food, health (and water) and of the obligations under IHL and general international law," p. 64 f.

7 KUIJT, p. 64.

8 STOFFELS, p. 519.

9 KUIJT, p. 59 f.

10 UN GA Resolution 46/182, Annex I; on the overall topic, see p. 20 and fn 35.

11 VIGNY/THOMPOSON, p. 193 f; see CLAPHAM, Rights and Responsibilities, p. 20.

12 JACKSON, Genva Call Study, p. 6.

Finally, the ICRC Study on Customary Law confirmed that there is recognition within the international community that the civilian population in humanitarian crises, including in situations of non-international armed conflict, has a right to receive humanitarian relief which is essential to its survival.[13] The study refers in this regard to State practice as well to the practice of the UN Security Council, UN General Assembly and the UN Commission on Human Rights, which have underlined on several occasions the rights of civilians to access relief supplies.[14] It cites that in the report on emergency assistance to Sudan in 1996, the Secretary-General of the UN stated that:

> Any attempt to diminish the capacity of the international community to respond to conditions of suffering and hardship among the civilian population in the Sudan can only give right to the most adamant expressions of concerns as a violation of recognized humanitarian principles, most importantly, the right to civilian populations to receive humanitarian assistance in times of war.[15]

The ICRC has also reasserted such a right in its communication to the press in 1997 concerning the non-international armed conflict in Zaire, where the ICRC appealed to all concerned conflict parties to "respect the victims' right to assistance and protection."[16]

Thus, even on different bases, according to both views in the doctrine, IHRL provides affected civilians the right to receive humanitarian relief.[17]

3 Duty Not to Take Part in Hostilities and Impede Relief Actions

During armed conflicts civilians also have duties which they must respect. For example, in order to have the status of a civilian under IHL and to enjoy the protection and respect which is based on that status, it is required that civilians do not take active part in hostilities. Furthermore, they have the duty not to impede the transport of relief supplies to enable effective delivery by the party

13 ICRC Study on Customary IHRL, Rule 55.

14 VIGNY/THOMPOSON, p. 193 f.; on the overall topic, see ICRC Study on Customary IHRL, Rule 55.

15 UN Secretary-General, Report on emergency assistance to Sudan, para. 706; see ICRC Study on Customary IHRL, Rule 55.

16 ICRC, Communication to the Press. No. 97/08, para. 721.

17 KUIJT, p. 65.

to the conflict. Civilians may obstruct the delivery of aid, for example, as an act of frustration. There can also be looting of relief goods by criminal gangs.[18] The duties not to take part in hostilities and impede relief can be derived from different IHL regulations and are often also mentioned under national law of a State, namely as a forbidden crime. The enforcement of these duties is therefore often subject to national law. As these duties are less relevant to the topic of this book, they will not be discussed further.

18 ROTTENSTEINER, p. 557.

PART 3

Arbitrary Withholding of Consent to Relief Operations

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CHAPTER 11

Characteristics of Withholding of Consent

1 Withholding and Withdrawing of Consent

The problem of not providing consent to relief actions is reflected in the doctrine and practice under different terms: While in the academic field it is often called "withholding of consent," in practice and in media it is rather referred to as "refusal" or "denial" to relief operations. Whereas the expressions "refusal" or "denial" grammatically describe a negation to a request, the term "withholding of consent" leaves open the act that may lead to an impediment to relief. Since, as will be outlined later, disapproval of relief actions can be constituted by different actions than negation, and even by omission, the term "withholding of consent" seems more accurate to capture the here concerned problem. This book will therefore generally use the expression withholding of consent.

Further, the provision of relief may be impeded not only in the beginning by not giving consent to the initial request, but also after once consent has been given by withdrawing that consent. This may be expressed explicitly or implicitly for example by not taking further steps for an effective implementation of relief, and will be outlined in more detail later. In contrast to "withholding of consent," the expression of "withdrawing of consent" is not found in legal documents or reports of international bodies. Nevertheless, the doctrine assumes that if conflict parties have the right to withhold their consent at the beginning, they consequently have also the right to withdraw it at a later stage. Since the factual environment and consequences of withdrawing of consent are similar to those of withholding of consent, namely lack of approval of the concerned party and impediment to the provision of relief, the legal provisions relevant to withholding of consent can also be applied by analogy to situations of withdrawing of consent.[1] This book therefore does not discuss withdrawal of consent separately, but mentions it specifically where it shows a particularity in practice. Otherwise, it can be referred to what is said to withholding of consent, particularly that the grounds for assessing the arbitrariness of withholding of consent also applies to withdrawing of consent.[2]

1 On the overall topic, see Gillard, Cross-Border Relief Operations, p. 26.

2 Once it is determined that consent has been withdrawn, it is has to be established whether this was for valid or arbitrary reasons; see Gillard, Cross-Border Relief Operations, p. 26.

2 Forms of Expression

International law does neither specify the form in which consent to humanitarian relief can be given nor how it can be withheld.[3] In the doctrine it is questioned if the term "consent" in Article 18 AP II for non-international conflicts implies a less formal act than the word "agreement" in Article 70 AP I for international conflicts.[4] It is concluded, however, that the form of consent may not play a significant role in the precarious situation in which the negotiation process takes place during an armed conflict.[5] It is therefore considered as sufficient, in both international as well as non-international conflicts, if consent is expressed in a manner that manifest the intention of the conflict party noticeably to external actors. Accordingly, withholding of consent may also be expressed in any form, explicitly or implicitly, as long as it can be interpreted as disapproval.[6]

2.1 *Explicit Withholding and Withdrawing*

An explicit withholding of consent may be a verbal or written answer to a request from humanitarian actors. An explicit withdrawal of consent is often a reaction to changed circumstances in the conflict or political sphere, instructing humanitarian actors to leave the country and threatening them with attacks if they do not comply.[7] This was the case, for example, when Sudan urged a number of NGOs to terminate their operations after an indictment against President Bashir was brought before the ICC.[8]

2.2 *Implicit Withholding*

Consent is withheld implicitly when a nonverbal act of the requested party can be interpreted as disapproval. In practice, it is unsettled when exactly an implicit act or omission by a conflict party may constitute a withholding of consent.[9] As a directive, however, it can be said that when a conflict party fails to respond to relief organisations' requests within a reasonable time, this can be considered an implicit withholding of consent.[10]

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3 AKANDE/GILLARD, Oxford Guidance, p. 19.
4 BOTHE/PARTS/SOLF, p. 697; see also GILLARD, p. 25.
5 GILLARD, p. 25.
6 GILLARD, Cross-Border Relief Operations, p. 25.
7 Discussion with Simon Bagshaw, 24 July 2017.
8 On the overall topic, see GILLARD, Cross-Border Relief Operation, p. 26; KÄLIN, p. 351.
9 AKANDE/GILLARD, Oxford Guidance, p. 41.
10 AKANDE/GILLARD, Oxford Guidance, p. 19; ICRC, Commentary to APS, para 4884.

However, absence of reaction does not always constitute a withholding of consent. As mentioned before, in situations of a failed State, an omission can exceptionally be interpreted as consent, given the importance of the provision of relief.[11] But in all other cases, where there is a lack of response, it should be interpreted as an implicit withholding, especially in view of the sovereign rights of the State concerned.

2.3 *Implicit Withdrawing*

It occurs frequently in practice that consent is implicitly withdrawn by imposing significant impediments after initial consent to relief actions has been granted. This is for example the case when conflict parties claim their right to restrict humanitarian relief and prescribe technical arrangements to a degree that humanitarian actors are unable to act, making the provision of relief virtually impossible.[12] Such implicit restrictions are therefore in their consequences equal to an explicit withholding of consent.[13] But also, when conflict parties fail to provide the required protection to humanitarian actors in areas under their control, or actively attack convoys or physically prevent humanitarian convoys from reaching the civilian population, or fail to agree on a so-called humanitarian corridor that would allow humanitarian assistance to reach the population in need[14], it constitutes an impediment to humanitarian relief which can be interpreted as a subsequent withdrawal of consent. At what point subsequent impediments may amount to a withdrawal of consent needs to be determined on a case-by-case basis.[15]

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11 Gillard, Cross-Boder Relief Operation, p. 25.

12 Gillard, Cross-Boder Relief Operation, p. 26.

13 Sassòli, Transnational Armed Groups, p. 1.

14 Bartels, p. 289, compare also with Rottensteiner, p. 580 f.

15 Gillard, Cross-Boder Relief Operation, p. 26. For example, it has been questioned at what level relief supplies must be diverted, question raised by Ryngaert, Humanitarian Assistance, p. 5 ff.; doctrince is divided on this question. Stoffels, for example, considers that it is only when an 'excessively large portion of aid' is diverted to the opposition that access could be denied, see Stoffels, p. 542; in contast, Bartels responds that this would appear to be a far too high threshold, especially in the context of a criminal trial, see Bartels, p. 289.

CHAPTER 12

Prohibition of Arbitrary Withholding of Consent

1 Legal Basis

1.1 *Rule of Customary Law*

Although the prohibition of arbitrary withholding of consent to relief is mentioned as a rule of customary law,[1] there is, however, not much said where the legal basis of this rule lies. An examination of this question reveals that the *opinio iuris* on the prohibition of arbitrary withholding of consent to relief can be derived from norms of the AP I and II to the GCs.[2] Particularly the grammatical and effective interpretation of Article 70 (1) AP I and Article 18 (2) AP II implies that the right to withhold consent is not entirely discretionary, but requires valid reasons (1.2). This understanding can also be approved from a historical perspective as a corresponding interpretation already existed during the negotiation process to the APs (1.3).[3] Subsequent State practice and agreements have further hardened the conviction that consent cannot be arbitrarily withheld as a rule of customary international law (1.4).[4]

1.2 *Grammatical and Effective Interpretation of APs*

Article 70 (1) AP I and Article 18 (2) AP II state for international and non-international armed conflicts that humanitarian relief actions "shall be undertaken subject to the consent" respectively "agreement" of the State concerned. While the term "subject to the consent" or "agreement", as explained before, indicates that consent is required, but that States have a right to withhold this

1 See on the overall topic AKANDE/GILLARD, p. 489 ff.

2 Art. 31–33 of the VCLT contain rules governing the interpretation of international treaties, which reflect also international customary law. Beside the general interpretation principles, there is also an interpretation in good faith and the subsequent practice of the member States in implementing the treaty is of particular importance. Furthermore, systematic interpretation is understood in a broader sense and includes also other treaties between the member States on similar or related topics. Historical interpretation, based on negotiation protocols or other preparatory work, has only a subsidiary meaning to confirm the conclusion resulting from the application of the other principles of interpretation. But it may have an independent importance if the result of the interpretation according to the other principles is not reasonable; in detail see KÄLIN/EPINEY/CARONI/KÜNZLI, p. 29 ff.

3 AKANDE/GILLARD, Oxford Guidance, para. 44.

4 AKANDE/GILLARD, Oxford Guidance, para. 44; ICRC Customary Law Study, Rule 55.

consent,[5] the expression "shall be undertaken" stands for a strong determination to do something and indicates that humanitarian relief is compulsory and shall remain in general possible.[6] This requires, in view of the principle of effectiveness, which stipulates that a treaty must be interpreted in such a way that it doesn't leave any parts of the respective provision meaningless or redundant,[7] that the right to withhold consent according to AP I and II may not be interpreted as an unlimited right of the conflict party, as this would enable a general exclusion of humanitarian relief. An effective interpretation rather suggests to understand the relevant norms as that consent is required, but it may not be withheld on any possible grounds, but only on accepted valid ones. Such an understanding gives effect to both requirements of the norm, namely the requirement of consent and the requirement that humanitarian relief shall be undertaken.[8]

1.3 *Historical Perspective*

A prohibition of arbitrary withholding of consent is also reflected in the negotiation records of the APs. While in the draft versions of the Additional Protocols established an obligation to accept relief if it met certain requirements, such as impartiality and humanity, this was adjusted during the diplomatic conference of 1974–1977 in view of the sovereignty of the State accepting relief, and the requirement of consent was added, while clearly stating that this condition did not imply that the affected Parties had discretionary freedom to refuse relief actions.[9] The Representative of Germany specified with regard to the formulation of the requirement of consent that: "those words did not imply that the Parties concerned had absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones."[10] This statement was not opposed

5 See Chapter 6 2.3.

6 Oxford Dictionary, Definition of *shall*, available at https://en.oxforddictionaries.com/definition/shall (last visited 31 August 2023).

7 On the overall topic, see AKANDE/GILLARD, Oxford Guidance, p. 489 f.

8 Slightly different: AKANDE/GILLARD, Oxford Guidance, p. 489 f.; see also ICRC, International Humanitarian Law, p. 25; And also the principle of good faith requires a balance between treaty elements so that that the exercise of a right is not extensive and abusive, see on this AKANDE/GILLARD, Oxford Guidance, p. 490; KÄLIN/EPINEY/CARONI/KÜNZLI, p. 33.

9 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1974–1977, CDDH/I/SR.87, p. 27–30; see also ICRC, Commentary on the APs, para. 2805.

10 Position of Germany, see CDDH/II/SR.87, p. 336 f.; No opposition from any State. Similar comments also in regard to the requirement of consent in Art. 18 AP II by Belgium and

by any of the other State parties. In contrast, USA, the Netherlands, the USSR and the UK even expressed their support.[11] And a leading commentator participating in the negotiations concluded 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."[12]

1.4 *Subsequent State Practice and Agreements*

The implementation practice of the APs by the States, as well as various formulations of rules on humanitarian assistance, show that States also took the view, in their subsequent State practice and following agreements, that consent to relief operations could not be withheld arbitrarily.[13] For example, the Guiding Principles on Internal Displacement state for situations of armed conflict:

> International humanitarian organisations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a state's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.[14]

Similar formulations are also found in the Resolution on Humanitarian Assistance of the Institute of International Law[15] and in the Council of Europe Recommendation (2006)6 on Internally Displaced Persons[16] And even for circumstances beyond armed conflict, the International Law Commissions (ILC)

Germany, see CDDH/II/SR.53, p. 156 f.; see AKANDE/GILLARD, Oxford Guidance, p. 21; ICRC, Commentary on the APs, paras 2805 and 4885.

11 Support of USA, the Netherlands, the USSR and the UK, see CDDH/II/SR.87, p. 27.

12 AKANDE/GILLARD, Arbitrary Withholding, p. 490 f. with further references.

13 AKANDE/GILLARD, Arbitrary Withholding, p. 489.

14 Principle 25(2) of the Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2, 11 February 1998.

15 Institute of International Law, Burges Session 2003, Resolution on Humanitarian Assistance, 2 September 2003, Article VIII ("duty of affected States not to arbitrarily reject bona fide offers of humanitarian assistance").

16 Council of Europe Recommendation (2006)6 of the Committee of Misters to Member States on Internally Displaced Persons, 5 April 2006, para 4; See on the overall topic UNIVERSITY OF OXFORD, Background Paper, p. 3.

confirmed this principle in its Draft Articles on the protection of persons in the event of disasters.[17] The State's opinion that arbitrary denial of access is prohibited is further confirmed in several resolutions and decisions of UN bodies.[18] For example, in 1998, the UN Secretary-General stated that "[h]umanitarian access is, inter alia, a right of refugees, displaced persons and other civilians in conflict situations and should not be seen as a concession to be granted to humanitarian organisations on an arbitrary basis."[19] Any refusal must be based on valid and lawful grounds.[20]

Moreover, UN entities have recalled this view various times in their resolutions, like for example the Security Council in its landmark Resolution 2165 (2014) on Syria (which will be discussed in detail later):

> noting the United Nations Secretary-General's view that arbitrarily withholding of consent for the opening of all relevant border crossings is a violation of international humanitarian law.[21]

2 Assessing Arbitrariness

What amounts to arbitrariness with regard to the withholding of consent to relief operations has to date not been defined by any international body.[22] The notion of arbitrariness is in general interpreted broadly in international law, and there is not an all-encompassing definition which is applicable to all kinds of situations.[23] Whether the withholding of consent to relief action leads to arbitrariness has therefore to be determined on a case-by-case basis.[24]

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17 Article 14 of the ILC Draft Articles on the protection of persons in the event of disasters, supra, dealing with the 'Consent of the affected state to external assistance'; see International Law Commission, Report of its sixty-third session, p. 267; see AKANDE/GILLARD, Oxford Guidance, p.22.

18 AKANDE/GILLARD, Oxford Guidance, p. 22 with further references.

19 UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflict situations, para. 15.

20 SFDFA, Normative Framework, p. 25 f.

21 UN SC Resolution, 2165 (2014), para 24.

22 GILLARD, Cross-Border Relief Operations, p. 21.

23 Also, the ILC Draft Articles on the Protection of Persons in the Event of Disasters and the commentary thereto do not clarify the notion of arbitrary withholding of consent to humanitarian assistance, see SIVAKUMARAN, Arbitrary Withholding of Consent, p. 516.

24 SFDFA, Normative Framework, p. 25; UNIVERSITY OF OXFORD, Background Paper, pp. 4 and 7.

In this respect, it is to be recalled that the issue of consent only arises where the preconditions for providing relief, as mentioned before, are met. If this is not the case, the concerned conflict party can refuse relief actions validly by simply referring to the unmet conditions without further justification.[25] According to the view of the author of this book, at this stage it would be more correct to call the response of the conflict party a valid refusal of the offered relief actions, rather than a withholding of consent, which is often confused in the doctrine and practice.[26] A proper distinction of situations of simple refusal is important (2.1). Only when the conditions for the provision of relief are met can the party to the conflict consider giving consent but have the right to withhold it for valid reasons. Therefore, it is only in instances of withholding of consent that the grounds need to be examined to determine whether they are arbitrary or not. Although there is no general definition of arbitrariness and each case must be examined on its own terms, there are nevertheless some standards in doctrine and practice which can be used as guidelines for assessing arbitrary withholding of consent (2.2).

2.1 *Distinction from a Valid Refusal*

Refusing relief because the concerned conflict party believes that the conditions for providing relief are not given is, in practice, the main reason why relief is rejected.[27] This is for example the case when the affected party declares that there is no humanitarian crisis or that it is able and willing to provide the required humanitarian relief itself.[28] Another frequent situation in which relief is refused on the basis of unmet preconditions is when relief actions are not matched to what it is actually needed. For example, if food is being offered while medicine is in short supply.[29] Or similarly, when the required assistance is already sufficiently accepted and therefore equivalent relief from other humanitarian actors is declined. In practice, the affected State may receive

25 Van den Herik/Jägers/Werner, cavv Advisory Report, p. 19; sfdfa, Normative Framework, p. 25; Gillard, Cross-Border Operations, p. 26; Akande/Gillard, Oxford Guidance, p. 21.

26 For example, confused in the article of Sivakumaran, Arbitrary Withholding of Consent, p. 521 ff.

27 Sivakumaran, Arbitrary Withholding of Conset, p. 521.

28 According to the practice in diasater relief, this is the principal reason for withholding consent, Sivakumaran, Arbitrary Withholding of Consent, 521 f. with examples of the practice.

29 Apparently, it is not unusual in practice for massive amounts of unneeded and unsuitable aid to be brought in, see on this Sivakumaran, Arbitrary Withholding of Consent, p. 523 f.

offers from hundreds of relief organisations.[30] But, as mentioned before, humanitarian actors have no individual right to claim the provision of assistance. Hence, the conflict party concerned will decide the type of assistance which is required, taking into consideration all assistance measures offered.[31] In this respect, it seems acceptable if, in practice, relief is not accepted from humanitarian actors with whom the concerned conflict party does not have a friendly relationship, as long as the required assistance is already sufficiently covered by the conflict party itself or granted by other relief agencies.[32] Finally, the concerned conflict party may also refuse humanitarian actors based on the grounds that they are not acting in accordance with the humanitarian principles or if there are at least reasonable doubts surrounding the particular organisation that it might not be able to do so, for example if it does not have a good track record.[33] However, it has to be noted that in all the situations mentioned above, for a valid refusal it has to be determined if the objections of the concerned party correspond to reality or if they are rather unlikely or only a facade. If the latter is the case, there is a case of withholding of consent which has to be considered as arbitrary if there are no further reasons to justify the withholding. However, it is difficult in practice to determine if the objections of unmet conditions for providing relief are actually given.

It is further argued in the doctrine whether the conflict parties have a narrower margin of discretion in refusing relief operations based on unfulfilled conditions, once they have accepted them, than in refusing them in the first place. It is alleged that refusing relief because of unmet conditions at a later stage requires the concerned parties to become active themselves, to revise existing relief actions in the light of new situations and to cancel them if the conditions are no longer met, for example because the humanitarian actor in question is providing relief for which there is no longer a need or is operating lately in an unprincipled manner, whereas initially the initiative lies on the side of the humanitarian actor and the concerned party can easily refuse if it

30 Sivakumaran, Arbitrary Withholding of Consent. See also Gillard, Corss-Border Relief Operations, p. 24.

31 Duty to indicate of the affected State, explicitly mentioned in conventions for disaster relief, on this topic see Sivakumaran, Arbitrary Withholding of Consent, p. 524; that the determination if there are unmet needs of the cilviians requires that the possible assistance of all humanitarian actors has to be considered and not only the specific one whose operation is impeded, see Gillard, Cross-Border Relief Operations, p. 26.

32 Similar situations in disaster relief with practical examples, see Sivakumaran, Arbitrary Withholding of Consent, p. 524 f.

33 Sivakumaran, Arbitrary Withholding of Consent, p. 524; Gillard, Corss-Border Relief Operations, p. 24.

considers that the conditions are not met.[34] However, this line of argument is not fully convincing. The conditions for providing relief actions are the same in both situations, so the side of the initiative does not affect the discretion of the decision to refuse relief as such. But indeed, the requirement of self-initiative on the part of the concerned party is an additional obstacle to effectively taking the decision to refuse relief. Consequently, situations in which consent were refused after once they have been accepted have proven to be less common in practice than when it has been refused after the initial offer. Thus, in the majority of the cases, the concerned parties remain bound to the relief operations they have agreed to.[35]

2.2 *Situations of Arbitrary Withholding of Consent*

There are different attempts in the doctrine to give examples of arbitrary withholding of consent in situations of humanitarian emergency. All of them have in common that the term "arbitrary" is used in the sense of an unreasonable or unjustified ground. This can also be seen in the debates on the provision of humanitarian assistance in the context of Syria, for example, where the notions of "arbitrary" and "unjustified" have been used as interchangeable terms.[36] Thus, an arbitrary ground for withholding of consent is determined on the basis of whether the denial of the consent can be justified or not.[37] An arbitrary withholding of consent is therefore given when there is no legitimate aim pursued by the withholding (2.2.1).

But even if withholding is based on a valid reason, it may still be arbitrary, depending on the given circumstances or the further intentions or actions of the concerned conflict party. In this regard, reference can be made to the Oxford Guidance, which, based on IHL, IHRL and the general principles of public international law, identifies three categories in which the withholding of consent to humanitarian relief operations may be considered as arbitrary,[38] namely when it constitutes a violation of another obligation under international law with respect to the affected civilian population (2.2.2), or when it is withheld in a manner that violates the principles of necessity and

34 Gillard, Cross-Border Relief Operations; on the overall topic, see Van den Herik/Jägers/Werner, cavv Advisory Report, p. 19 and fn. 32.

35 Van den Herik/Jägers/Werner, cavv Advisory Report, p. 19 and fn. 32.

36 For example, in UN sc Ressolution 2165 (2014); see on this Sivakumaran, Arbitrary Withholding of Consent, p. 517.

37 Effectively, or at least when there are justified doubts surrounding the fact that they are not acting in accordance with the prinicples, Sivakumaran, Arbitrary Withholding of Consent, p. 517.

38 Akande/Gillard, Oxford Guidance, p. 22.

proportionality (2.2.3), or when it is unreasonable, leading to injustice, lack of predictability or is in another way inappropriate (2.2.4).[39] The Oxford Guidance describes these categories as separate classifications. But a closer look shows that not all situations of arbitrary withholding can be placed exclusively in one category. For example, a breach of an international obligation can also be a violation of the principles of necessity and proportionality.[40] On the other hand, where no international obligation is breached, the withholding of consent may be still arbitrary if it is not respecting the principle of necessity and proportionality. Furthermore, the category of withholding of consent in a manner that is unreasonable, injust, unpredictable or otherwise inappropriate includes, for example, the withholding of consent without giving any reason,[41] which is also considered by some views in the doctrine as a breach of the international obligations of the concerned conflict party. Thus, the different categories outlined in the Oxford Guidance, together with the requirement of a legitimate aim, have to be understood rather as non-exclusive and interrelated criteria for assessing different forms of arbitrary withholding.

2.2.1 No Legitimate Aim

It is generally agreed that grounds such as the State sovereignty, internal legal order, national pride and interests, political orientation and the interests of the regime in power do not prevail when civilians are in distress.[42] Similarly, reasons such as that the local population is seen as supporting the opposing party are not acceptable as grounds for withholding consent.[43]

A legitimate aim for withholding of consent in situations of armed conflict is primarily a military necessity, such as ongoing military fighting in a particular area which may endanger the safety of humanitarian actors.[44] "Imperative military necessity" is explicitly mentioned in AP I as a legitimate reason for limiting relief actions and restricting the movement of humanitarian relief which

39 AKANDE/GILLARD, Oxford Guidance, p. 22.

40 While certain IHRL obligations are absolute and are considered as violated by their limitation, other obligations allow a limitation, if they are in accordance with the principles of necessity and proportionality; instead of many, see SIVAKUMARAN, Arbitrary Withholding of Consent, p. 524.

41 AKANDE/GILLARD, Oxford Guidance, p. 25.

42 See SIVAKUMARAN, Arbitrary Withholding of Consent, p. 524; SFDA, Normative Framework, p. 26 fn. 49.

43 See SIVAKUMARAN, Arbitrary Withholding of Consent, p. 502.

44 See SIVAKUMARAN, Arbitrary Withholding of Consent, p. 525.

has already been consented to.[45] However, it is also accepted as a legitimate aim for withholding the initial consent to relief actions. Besides, there may be other safety reasons of a non-military nature, such as an ongoing major police operation, which may prevent the concerned party from giving its consent.[46]

2.2.2 Violation of Other Obligations of the Concerned Conflict Party with Respect to the Civilian Population

Withholding of consent to relief operations is also regarded as arbitrary if the withholding results in a violation of obligations of the concerned conflict party under international law with respect to the civilian population. This understanding follows from the principle of systematic integration which is codified in Article 31(3)(c) of the VCLT[47], and which provides that an international treaty norm shall be interpreted in the context of "any relevant rules of international law applicable in the relations between the parties." Although Article 31(3)(c) of the Vienna Convention refers to the interpretation of treaty norms, the principle of systematic integration is acknowledged as a rule of customary international law[48] which can be applied beyond treaties and which can cover both the interpretation of written and unwritten sources.[49] The content of the principle can therefore be formulated more generally as that the interpretation of an international obligation requires that account be taken of other legal provisions which have to be respected by the concerned party in the same subject matter under international law.[50] Thus, in order to interpret the content of the obligation to provide relief and not to withhold consent to relief operations

45 Article 71 (3) AP I; By requiring that military necessity has to be imperative, IHL recalls that even the pursuit of a legitime aim must be in accordance with the principle of necessity, ICRC Commentary on APs, para. 2896.

46 SIVAKUMARAN, Arbitrary Withholding of Consent, p. 525.

47 AKANDE/GILLARD, Oxford Guidance, p. 23, in reference to the Article 30(3)(c) VCLT, formulated from a State's view, but also applicable to parties bound by a treaty norm.

48 Art. 31 has been repeatedly recognised as customary international law in international jurisprudence, see on this outlining in MERKOURIS, p. 2 ff.

49 MERKOURIS, p. 195 ff. On this principle, see also the ICJ, *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, para 25, where the ICJ interpreted the expression "arbitrary" by reference to other applicable obligations under international law. Moreover, the Human Rights Committee has stated that the concept of arbitrary conduct includes unlawful conduct but is broader, see on this HRC General Comment No. 35: Liberty and Security of Person (Art. 9), paras. 11 and 12. See also UN Secretary-General, Report on Human Rights and Arbitrary Deprivation of Nationality, UN doc A/HRC/13/34, 14 Dec 2009, para 25. See also, ICRC Commentary to GC I, paras 835–937.

50 See MERKOURIS on Article 31(3)(c) of the VCLT and the Principle of Systematic Integration, p. 15.

arbitrarily, it is also required to take into account the obligations (outside the context of relief operations) of the conflict parties which have to be respected by them in situations of humanitarian crisis with regard to the civilian population. Consequently, where withholding of consent leads to breaches of these other obligations of the conflict parties, withholding of consent will be found to be arbitrary.[51]

There are various circumstances in which the withholding of consent to relief operations may violate the international obligations of the conflict parties with respect to the civilian population during armed conflict. With regard to their scope, these circumstances and the relevant breaches of law will be outlined and discussed in detail later.[52]

2.2.3 Violation of the Principle of Necessity and Proportionality

The practice of international tribunals and other international bodies shows that for determining whether a measure is arbitrary, it is generally questioned if a measure is necessary and proportionate to the objective sought to be achieved. Thus, even if consent to relief operations is withheld for a reason which appears to be valid in the instance, and which has no intention or impact that could lead to a breach of international law, it must nonetheless be concluded to be arbitrary if it exceeds what is necessary and proportionate in the particular case. For example, an initially legitimate objective, such as ongoing hostilities and security reasons, may become arbitrary once humanitarian emergencies last for such a long time that the needs of the affected civilian population become severe. In this case, the needs of the civilian population prevail the security considerations.[53]

The principle of necessity and proportionality is explicitly mentioned in AP I in the context of of limiting and restricting humanitarian relief by requiring that humanitarian activities may be limited and the movement of relief personnel temporarily restricted if there is a military necessity that is imperative. Thus, even if there is a military necessity, limitations and restrictions on relief operations have to be essential and unavoidable to ensure the security of the relief operations.[54] By mentioning that the movement of the relief personnel may be temporarily limited, the temporal aspect of the principle of

51 Equal result, but withthout explanation: AKANDE/GILLARD, Oxford Guidance, p. 23.

52 See Chapter 13.

53 SIVAKUMARAN, Arbitrary Withhodling of Consent, p. 502.

54 Explicitly stated in Article 71 (3) AP I, see hereto OCHR, p. 52; see also GILLARD, Cross-Border Operations, p. 26.

proportionality is emphasised and requires that any imposition and prolongation of the limitation must be strictly necessary.[55]

And IHRL also allows derogations and limitations to human rights, subject to the principles of necessity and proportionality.[56] The ICCPR, for example, recognises that in time of public emergency, including armed conflict, "which threatens the life of the nation and the existence of which is officially proclaimed", States Parties may take measures derogating from their obligations under the Covenant.[57] Similar provisions on derogation can also be found in regional human rights conventions.[58] The ICESCR, on the other hand, accepts the possibility of limitations to the rights protected by the Covenant, as they are defined by law and "only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."[59] According to international jurisprudence and practice, restrictions on human rights must, in accordance with the principle of proportionality, limit to the maximum extent possible their impact on the enjoyment of other rights. The ICJ, for example, has noted in this regard that restrictions on human rights must, in accordance with the principle of proportionality, be "the least intrusive instrument amongst those which might achieve the desired result."[60]

Accordingly, the withholding of consent to relief operations may not go beyond what is strictly necessary to achieve the legitimate aim in terms of time, duration, location and goods and services involved. Exceeding these requirements leads to arbitrary withholding of consent.[61]

2.2.4 In Other Way Inappropriate under International Law

Consent is also considered as arbitrarily withheld if it is done in a manner that is unreasonable or may lead to injustice or lack of predictability, or if it

55 Exceeding these requirements for limitation and restriction of consented relief actions constitutes an arbitrary withdrawal of consent. Where military necessity is invoked as a reason for withholding initial consent, these provisions can be correspondingly applied to determine whether the withholding is arbitrary or not.

56 Instead of many, OCHR, p. 49.

57 Article 4(1) ICCPR. It should be noted here that the state of emergency includes situations of armed conflict, but the existence of an armed conflict does not in itself constitue an emergency, but rather a threat, on the overall topic, see OCHR, p. 47.

58 For example, in Article 14 ECHR.

59 Article 4 ICESCR.

60 OCHR, p. 51.

61 AKANDE/GILLARD, Oxford Guidance, p. 24 with further references.

otherwise appears inappropriate.[62] This category constitutes an open-ended list, particularly for situations where the withholding of consent seems to be inconsistent with internationally accepted standards, but may not fit into the other categories of arbitrary withholding of consent.

For example, when consent is withheld without providing any reasons,[63] it leads to a lack of predictability. The communication of the grounds for withholding consent is required to know whether the concerned party is acting in compliance with its obligations relating to humanitarian relief operations. If this requirement is not fulfilled, it is impossible to assess whether the reasons underlying the withholding are valid or not.[64] The ILC has noted in relation to assistance during natural disasters that "(t) the provision of reasons is fundamental to establishing the good faith of the affected State's decision to withhold consent. The absence of reasons may support the conclusion that the withholding of consent is arbitrary."[65] And the ICJ noted that the explanation of the withholding also provides the requested party with the possibility to substantiate its good faith in refusing the request.[66] In view of the importance of providing reasons for withholding consent, there are some voices in the doctrine which even claim that it is an international obligation of the concerned party. However, according to the view of the author of this book, the provision of a reason for withholding consent is not a new obligation, but a consequence of the right to withhold consent and the obligation not to withhold for arbitrary reasons.[67] Thus, it is indeed required that the reason is provided in a timely manner so that it can be assessed whether concerned party is acting in accordance with its rights and duties.[68] But if it is not done, it can be presumed that the withholding of consent may be unjustified and arbitrary. The

62 AKANDE/GILLARD, Oxford Guidance, p. 25 referring on HRC General Comment No. 35: Liberty and Security of Person (Art. 9), para. 12.

63 AKANDE/GILLARD, Oxford Guidance, p. 25.

64 GILLARD, Cross-Border Relief Operations, p. 24; But also in the Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, UN Doc A/65/282, 1 August 2010, para 82; With regard to disaster event, see SIVAKUMARAN, Arbitrary Withholding of Consent, p. 519 ff.

65 ILC Commentary to Article 11 of the draft articles on the protection of persons in the event of disasters, para 8.

66 ICJ, *Djiboui v France*, para 152; on the overall topic, see SIVAKUMARA, Arbitrary Withholding of Consent, p. 520.

67 SIVAKUMARAN, Arbitrary Withholding of Consent, p. 520.

68 Timeliness is also stressed, for example, in the Framwork on Convention on Civli Defence Assistance, which states that "(o)ffers of, or requests for assistance shall be examined and responded to by recipient States within the shortest possible time," Article 3(e), hereto SIVAKUMARAN, Arbitrary Withholding of Consent, p. 521.

presumption is rebuttable, however, if the facts on the ground indicate that there are valid reasons for withholding the consent.[69]

69 For situations of disaster relief, SIVAKUMARAN, Arbitrary Withholding of Consent, p. 521.

CHAPTER 13

Violation of Other International Obligations

1 Relevant Breaches of Law

In a non-exhaustive list, the Oxford Guidance names situations when withholding of consent to relief actions may be constituted as arbitrary, as this withholding of consent violates other international obligations of the conflict parties. It is noticeable that the Oxford Guidance mentions in that list only situations of possible breaches of IHL and IHRL, but not of international criminal law.[1] This is insofar comprehensible as according to the definition before, withholding of consent is considered as arbitrary if it breaches other obligations of the concerned conflict parties. Since international criminal law deals, in contrast to IHL and IHRL, with the responsibility of individuals and not of entities such as States or armed groups, one could conclude that breaches of criminal law are not breaches of obligations of the concerned conflict parties and therefore not relevant in the context of assessing arbitrariness of a withholding of consent to relief.[2] But in this regard, it has to be recalled that even though international criminal law holds only individuals responsible, it considers as criminal offences situations of gross and serious IHL and IHRL violations.[3] States and non-State armed groups are therefore not only obliged to prevent crimes committed by individuals, but must on the basis of IHL and IHRL also refrain themselves from acts which may constitute a crime under international criminal law.[4] Possible breaches of criminal law have therefore

1 Akande/Gillard, Oxford Guidance, p. 23.

2 Breaches of international criminal law are discussed by the Oxford Guidance only in relation to individual responsibility when an arbitrary withholding of consent leads to an international crime. It is not, however, considered in respect to violations of international obligations which may constitute arbitrariness of the withholding in the first place, Akande/Gillard, Oxford Guidance, p.49.

3 "International criminal law is a body of international rules designed to proscribe certain categories of conduct and to make those persons who engage in such conduct criminally liable," Cassese, International Criminal Law, p. 3; see on this also OHCHR, p. 74.

4 Werle/Jessberger, p. 54. In the context of crimes, it is often the obligation to protect other individuals, which is discussed often. But it is obvious that respect of IHRL requires that States refrain from criminal acts which harm individuals; According to the General Assembly, States have the responsibility to protect their populations from crimes. This responsibility includes, besides preventing such crimes, the prevention of the incitement to commit them, see on this the UN GA Resolution 60/1, paras. 138–139; OHCHR, p. 95.

to be taken into account for determining whether States or armed groups are withholding consent arbitrarily or not. Thus, it can be summed up that arbitrary withholding of consent to relief actions can result from breaches of other obligations of the conflict parties under IHL and IHRL. Since IHL and IHRL are also breached in situations where withholding of consent leads to a crime under international criminal law, breaches of international criminal law are also important indicators for assessing whether consent to relief is withheld arbitrarily or not.

In the following, there will circumstances outlined where withholding of consent may constitute a prohibited offence under IHL (2), IHRL (3) and criminal law (4). Those examples are of course non-exhaustive and do not include all breaches of law which withholding of consent may constitute. The present book, however, tries to identify the most common offences which may be claimed in situations of withholding consent to relief actions. It should be noted that certain offences are prohibited under IHL, IHRL as well as international criminal law. The elements of those offences may however differ on certain aspects depending on the area of law, which is why they will be discussed under all areas of law that prohibit such an offence.

2 Breaches of IHL Obligations

2.1 *Humane Treatment as a Basic Principle*

Humane treatment is understood in IHL as a basic and overreaching concept which finds expression and application in other regulations on treatment of civilians.[5] Thus, any breach of a rule in relation to civilians also constitute a breach of the principle of humane treatment. Humane treatment is established as a general principle in Common Article 3 of the GCs which provides that persons who are not taking an active part in the hostilities of a non-international armed conflict "shall in all circumstances be treated humanely." This is also stated in Article 4(2) AP II, while Part II (which includes Article 4, 5 and 6) of AP II is entirely dedicated to the principle of humane treatment and defines fundamental guarantees which must be respected with regard to such persons. The principle of humane treatment is also a norm of customary IHL.[6]

5 ICRC Study on Customary IHL, Rule 87.

6 ICRC Study on Customary IHL, Rule 87 and Rule 90; on the overall topic, see SIVAKUMARAN, Non-International Armed Conflict, p. 255.

2.2 *Prohibition of Starvation of the Civilian Population*

A typical example of a situation of arbitrary withholding of consent to relief operations, often cited in doctrine, is the situation in which consent to relief is withheld with the intention of starving the affected civilian population.[7] The use of starvation is prohibited under IHL and constitutes a war crime according to international criminal law.[8] Since starvation of civilians leads to a breach of the human right to food, prohibition of starvation is often discussed in connection with civilians' right to food under IHRL.

Article 14 AP II states for situations of non-international armed conflict that starvation of civilians is prohibited as a method of combat and that "[i]t is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, corps, livestock, drinking water installations and supplies and irrigation works."[9] The term "starvation" therefore not only includes the restrictive meaning in which civilians are subjected to famine by depriving them of water or food, but it is also understood in a more general sense as deprivation or insufficient supply of essential commoditie or that which is necessary to survival. Starvation may therefore also include deprivation of non-food items such as medicine or even blankets.[10] The object of the prohibition of starvation under IHL is to preserve the means of subsistence of the civilians, in order to give effect to the protection to which they are entitled.[11] The list provided by Article 14 AP II of the protected objects which are indispensable to the survival of civilians is therefore an illustrative enumeration.[12] Relief consignments, which contain

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7 Among others, AKANDE/GILLARD, Oxford Guidance, p. 36; VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 18.

8 Due to State practice, prohibition of starvation has become a rule of customary IHL, ICRC Study on Customary IHL, Rule 53.

9 The prohibition of starvation under Article 14 AP II is considered as a specification of the general provision in Common Article 3, which imposes the conflict parties to guarantee humane treatment for all persons and prohibits violence to life; ICRC, Commentary on APs, para. 4794. It is worth noting that the provision in AP II is simplified compared to the equivalent provision in Article 54 AP I. For situations of international armed conflict, see ICRC, Commentary on the Additional Protocols, note 1456, on the whole AKANDE/GILLARD, Oxford Guidance, p. 23 referring to Article 54(1) AP I (for international conflicts) and Article 14 AP II (for non-international conflicts).

10 The meaning of starvation under IHL was particularly discussed this context of the drafting the Rome Statute, see DÖRMANN, p. 475 f.; see also ICRC Study on Customary IHL, Rule 55.

11 ICRC, Commentary on Additional Protocols, para. 4791.

12 ICRC, Commentary on Additional Protocols, para. 4802.

essential goods for the survival of the affected civilians, fall therefore under the protection of Article 14 AP II.

It should be further noted that with prohibiting to "attack, destroy, remove or render useless" civilian objects, Article 14 AP II points out the most common ways that starvation may be caused. It does not, however, provide an exhaustive list. Starvation can also result from an omission, for example by deliberately deciding not to take measures to supply the population with objects indispensable for its survival.[13] The ICRC states therefore in its Study on Customary IHL that denying access to humanitarian relief, which is intended for civilians in need, including wilfully impeding relief supplies, constitutes a violation of the prohibition of starvation.[14]

Finally, it should be noted that starvation is only prohibited when it is used as a method of combat. The intention is a crucial factor. Accordingly, starvation that is inevitable or an incidental effect during an armed conflict will not be in violation of Article 14 AP II. However, to call starvation an inevitable or incidental effect of the armed conflict in situations of humanitarian crisis, where relief is offered and there is a clear obligation to provide relief, is delicate.[15] The prohibition on using starvation against civilians is considered a rule from which no derogation can be made.[16] Thus, in situations where there is a real risk of starvation, withholding consent to relief may constitute a breach of Article 14 AP II which cannot be justified.[17] But the requirement of a respective intention on using starvation as a method of combat constitutes an additional obstacle in practice to address situations of arbitrary withholding of consent as a breach of law.

In this regard, the landmark resolution of the Security Council 2417 (2018), which will be discussed later, paves the way for a more solid understanding of the prohibition of starving civilians in armed conflicts.

2.3 *Prohibition of Collective Punishments*

During non-international armed conflict, parties to the conflict do not infrequently resort to collective punishment of civilians.[18] The prohibition of

13 ICRC, Commentary on APs, para. 4800.

14 ICRC Study on Customary IHL, Rule 53.

15 Similar argumentation, SIVAKUMARAN, Non-International Armed Conflict, p. 424.

16 ICRC, Commentary on APs, para. 4795.

17 No formulation was adopted by AP II in which an exception to the prohibition of starvation would have been made possible, neither in the case of imperative military necessity, see ICRC, Commentary on APs, para. 4795.

18 SIVAKUMARAN, Non-International Armed Conflict, p. 271.

collective punishments[19] is stated in Article 4(2)(b) AP II as a fundamental guarantee of protected persons under IHL during non-international armed conflicts.[20] The prohibition in AP II is derived from Article 33 GC IV, which reads: "No protected person may be punished for an offence he or she has not personally committed."[21] The prohibition of collective punishments applies the principle that one should be convicted of an offence only on the basis of individual responsibility. The scope of the prohibition is wide and includes beside judicial penalties handed out by courts, any kind of sanctions and punishments.[22] An unlawful punishment could therefore also constitute deprivation of relief supplies. This was for example the case in the war of Lebanon in 2006, when Israel imposed an air and sea blockade on Lebanon. Israel justified the action as necessary to cut off supplies to the militant Islamist group Hezbollah.[23] However, the blockade had a negative effect on the whole civilian population. Their access to humanitarian relief was severely limited and humanitarian organisations faced grave difficulties in providing relief to those

19 Collective punishments have to be differentiated from belligerent reprisal, which requires that they are taken in response to a violation of law. Which is in case of impediment of relief to civilians not the case and anyhow, reprisals are forbidden against protected persons.

20 The placement of the prohibition of collective punishment under the fundamental guarantee in AP II shows according to the ICRC Commentary the intention of the drafter to avoid any risk that prohibition could be interpreted as restrictive, see ICRC, Commentary on APs; see also KOSMOPOULOS, pp. 96 and 101; due to its customary nature, the prohibition of collective punishments also applies to States which are not party to the AP II, see ICRC, Commentary on GC IV, p. 379.

21 Article 33 of the GC IV, which reads: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited," on the overall topic, see KOSMOPOULOS, p. 95 f.

22 KOSMOPOULOS, p. 96 in reference to what the ICRC states in its commentary, that the prohibition should be understood in "its widest sense, and concerns not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) as the ICRC had originally intended"; See hereto SIVAKUMARAN, Non-International Armed Conflict, p. 272 with further references.

23 On 13 July 2006, first Israeli warships sealed the country's ports and harbours. In the following days, an air blockade was imposed by the Israel's air forces which completely cut Lebanon off from the outside world. Israel bombers further targeted the runways and the only international airport in the country, rendering them unusable; see on this KOSMOPOULOS, p. 108; more on the details of the blockade see also H. Fattah, S. Erlanger, Israeli Forces Blockade Lebanon, in The New York Times, 13 July 2006, available at https://www.nytimes.com/2006/07/13/world/africa/13iht-mideast.2196103.html (last visited 31 August 2023).

in need. It was undeniable that the blockade caused many civilian casualties. The international community therefore condemned the blockade as unjustified. The former UN Secretary-General Kofi Annan responded to the situation by explicitly urging Israel to lift the blockade in order for it "not to be seen as collective punishment of the Lebanese people."[24]

It can therefore be concluded that in situations of non-international armed conflict, where for example the concerned State withholds its consent to relief operations on territories under the control of the non-State armed groups with the purpose to cut off relief to the armed group, the withholding constitutes a breach of the prohibition of collective punishments since the impediment will inevitably cause sufferance and thus punish the innocent civilian population under the control of the armed group.

2.4 *Prohibition of Adverse Distinction*

The principle of non-discrimination is reflected in IHL in the rules prohibiting adverse distinction in treatment of the protected persons based on criteria like "race, colour, religion or faith, sex, birth or wealth or any other similar criteria"[25] This is stated for non-international armed conflicts in Common Article 3 of the GCs and is also further mentioned in Article 2(1) and Article 4(2) AP II.[26] Article 2(1) AP II adds as prohibited grounds for adverse distinction: further language, political or other opinions, and national or social origin or any other similar criteria.

The prohibition of adverse distinction ensures that protected persons such as civilians, the wounded and sick and others are treated with the same consideration by the parties to the conflict. The prohibition of adverse distinction requires in the context of humanitarian relief that relief is provided to those in need without adverse distinction. By prohibiting only "adverse" and not "any" distinction, it is implied that there should be no discrimination among persons on criteria like race, colour, religion, etc., but it does not exclude distinction as such. Thus, distinctions are allowed where it can be justified by essential differences of situations and needs of the protected persons.[27] In situations of relief, a distinction can be made for example on medical grounds and priority for relief can be given to those who most urgently need care.[28] This is explicitly

24 UN News Service, Annan Says Israeli Blockade of Lebanon Must Not Be a 'Collective Punishment', 31 August 2006, available at https://news.un.org/en/story/2006/08/190612 (last visited 31 August 2023); on the overall topic, see KOSMOPOULOS, p. 109 f.

25 Common Article 3 to the GCs.

26 AKANDE/GILLARD, Oxford Guidance, p. 23.

27 ICRC Commentary to GC I, Article 3, paras. 575 and 576.

28 ICRC Study on Customary IHL; Rules 88 and 101.

mentioned in Article 7 AP II which requires for wounded and sick persons – including enemy combatants – that they must receive, to the fullest extent practicable and with the least possible delay, the medical care they need, with no distinction on any ground other than medical ones.[29]

In situations where the affected State or the armed group withholds consent to relief areas, for example on the grounds that those areas are under the control of the adverse party or the civilians living there support the opposing conflict party, this would clearly be a distinction which finds no justification based on essential differences in the situation or need of the civilians. The criteria of the distinctions concernrather where they live or whom they support. While the support of a particular conflict group could be subsumed as a "political or other opinion" of the concerned civilians, the place of living cannot really be fit into any of the mentioned criteria in Common Article 3 nor Article 2(1) AP II. But the addition of the phrase 'or any other similar criteria' in both Articles indicates that the provided lists are not exhaustive but only illustrative. Adverse distinction founded on other grounds which are similar to those would therefore equally be prohibited.[30] The mentioned criteria in the lists refer to characteristics which form an essential part of a person's identity and cannot be easily abandoned.[31] The place of residency has been affirmed by the ECtHR as an aspect of the status of a person and thus, as part of his or hers identity which cannot be easily changed.[32] A distinction based on the place of living is therefore structurally comparable to the criteria mentioned in the list and would be a prohibited adverse distinction in the treatment of civilians.[33]

2.5 *Prohibition of Violence to Life and Person*

Violence to life and person is prohibited under conventional law, namely under Common Article 3 of the GCs and Article 4(2)(a) of AP II, as well as under customary IHL.[34] While Common Article 3 of the GCs states that violence to life

29 AKANDE/GILLARD, Oxford Guidance, section 51; VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 19 and fn. 32.

30 ICRC, Commentary on GCs, Article 3, paras. 569 and 570.

31 KÄLIN/KÜNZLI on prohibited distinguishing caracteristics, p. 414.

32 The place of residency has been affirmed by the ECtHR as an aspect of the status of a person on which discrimination is prohibited, see ECtHR, *Aleksandrov v. Russia*, para. 25.

33 Also mentioned as an example, however without any further exmplaination in BRYCE, p. 2; another example of adverse distinction would be the withholding of consent where relief is rejected to areas populated by a certain ethnic group with the intention to affect that particular group or a section of the civilian population, see on this VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 18.

34 ICRC Study on Customary IHL, Rules 87, 89 and 90, on overall topic, SIVAKUMARAN, Non-International Armed Conflict, p. 259.

and person is prohibited, Article 4(2)(a) of AP II goes more into detail in its definition and prohibits "violence to life, health and physical or mental well-being of persons." It is however agreed that both prohibitions of violence to life and person protect the physical and mental health of a person.[35] Certain acts which may fall under this prohibition have special mention in the law for the purpose of illustration, the provided list is however not conclusive. Relevant acts form this list in the context of withholding of consent to relief are for example murder, torture, and cruel treatment[36] and will be shortly explained in the context of IHL in the following section. According to Common Article 3 of the GCs those prohibitions "are and shall remain prohibited at any time and any place." With this, it reaffirms that those prohibitions are absolute and without exception, and there cannot be any military necessity arguments to justify inconsistency with those prohibitions.[37]

2.5.1 Murder

Murder under IHL is less strictly defined than in most domestic criminal law, which knows beside murder the offence of wilful killing, which is considered as less sever violence to life than murder. In IHL, however, murder is largely the same as wilful killing and is defined accordingly as an act or as an omission which leads to the death of the victim and which was committed with the intention to kill or cause serious harm to the body of the victim which the perpetrator should have reasonably known might lead to death of the victim.[38] Thus, murder can be committed without any active violence act against life which causes the death of the concerned persons, but also through omission and absence of actions. Further, murder does not require an intention for the death as a result, it is also sufficient where there is intention to bodily harm, if the party knew or at least should have known reasonably that this harm would lead to the death of the concerned person.[39]

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35 SIVAKUMARAN, Non-International Armed Conflict, p. 260.

36 Also explicitly mentioned in Common Article 3 and Article 4(2)(a).

37 KÄLIN/KÜNZLI, p. 391; ICRC, Commentary on GCs, para. 581 ff.

38 SIVAKUMARAN, Non-International Armed Conflict, p. 260; Murder is also specified as a war crime under the Rome Statute Article 8(2)(c)(i) and (ii) with respect to both international and non-international armed conflicts; see also ICTY, *Prosecutor v. Zenjil Delalic et. al.*, para. 543: "In sum, the Trial Chamber finds that inhuman treatment is an intentional act or omission, which, judged objectively, is deliberate and accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."

39 In contrast to criminal law, murder under IHL requires that the death of the victims occurs, muder attempts are not covered by IHL, ICRC, Commentary on GCs, para. 581 ff.

Accordingly, murder can be committed by withholding of consent to relief operations which leads to absence of provision of relief and where civilians in need die because of the lack of essential supplies. Even if the goal of the withholding of consent was not to kill the civilians in need, it constitutes nevertheless murder under IHL where there was an intention to harm and the conflict party knew or should have reasonable known that by not receiving the essential supplies, death would have occurred to those civilians. The latter circumstance will be hard to deny for the conflict party in situations of humanitarian crisis so that most of the situations of withholding of consent to relief have the potential to fulfil the conditions of murder where they cause the death of civilians.

2.5.2 Torture

Prohibition of torture is understood under IHL as an intentional infliction of severe pain or suffering, whether physical or mental, by an act or omission, to a person with the purpose of "obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind."[40] Even though this definition is similar to the one provided in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it does not comprise all elements of the definition applied there. In contrast to the UN Convention, IHL does not require for torture that the act has to be committed by a "public official or other person acting in an official capacity." This is particularly important in IHL, since otherwise non-State armed groups may not fall within the definition.[41]

Torture can be committed by an action or omission since the prohibition of torture includes beside the duty of omission also the duty of fulfilment. Since the categorisation of the duty of omission and fulfilment are rooted in IHRL, it will be outlined later whether withholding of consent to relief operation has to be considered as a prohibited action or omission. Torture is distinguished from other forms of ill treatment on the basis of the purpose for which it is committed and the severity of the physical or mental pain and suffering it causes.[42] Withholding of consent to relief would constitute an act of torture if it is committed, for example, with the intention to punish civilians for acts committed by the adverse conflict party or expel them from where they live,

40 Same elements as for Crimes for the ICC, definition of torture as a war crime (ICC Statute, Article 8(2)(a)(ii) and (c)(i)); ICTY, *Prosecutor v. Kunarac*, para. 1332.

41 SIVAKUMARAN, Non-International Armed Conflict, p. 261.

42 SIVAKUMARAN, Non-International Armed Conflict, p. 261.

which are recognised as possible purposes of torture.[43] Also the requirement of severe pain or suffering of torture could be fulfilled in those situations if the civilian population remain for a long period of time without access to essential supplies which are required for their survival. This argumentation can be justified on the basis of findings of humanitarian organs, which is why this aspect will be explained in depth later. It should be noted, however, that for assessing the severity of pain or suffering of torture, not only is the objective dimension of a circumstance taken into consideration, but also the subjective elements of a case, namely what the effects are for the individual victim with regard to his or her age, gender and health.[44] Thus, in situations of humanitarian crisis, the suffering of not having access to relief supplies may particularly affect persons in need of medical help, children and elderly. For those groups of persons, a situation of withholding of consent may therefore reach the threshold of severity of pain or suffering more quickly, which are elements to classify an act as torture.

2.5.3 Cruel Treatment

Cruel treatment, also referred to as "inhuman treatment," is an "act or omission (…) which causes serious mental or physical suffering or injury."[45] It can be committed by State actors or non-State actors, which is different from the definition in the UN Convention against torture, which also requires the involvement of State actors.[46]

In contrast to torture, cruel treatment does not require that the act is carried out with intention or a specific purpose, it is sufficient if the ill treatment causes suffering or pain of a certain severity.[47] Even though the caused pain and suffering can be for inhuman treatment less intense than for torture, it

43 Prohibited purposes of torture include obtaining information or confessions, punishing, intimidating, or coercing and discriminiating on any grounds, this is mentioned for example in ICTY, *Prosecutor v. Kunarac*, para 485; see SIVAKUMARAN, Non-International Armed Conflict, p. 261 f.

44 SIVAKUMARAN, Non-International Armed Conflict, p. 262; KÄLIN/KÜNZLI, p. 387.

45 SIVAKUMARAN concluded in this regard: "while the notions of outrages upon personal dignity and inhuman treatment are related, they are conceptually different." The prohibition of inhuman treatment and the prohibition of outrages upon personal dignity are therefore considered differently: inhuman treatment refers to integrity of the body and mind and outrages upon personal dignity relate to the dignity of a person, see SIVAKUMARAN, Non-International Armed Conflict, p. 262 et. Withholding of consent to relief is not an act with the primary goal of humiliation or degradation. This aspect is therefore not discussed further in this book.

46 Article 16 UN Convention against Torture.

47 SIVAKUMARAN, Non-International Armed Conflict, p. 262.

is difficult to make a distinction based purely on the intensity of an intervention. It is therefore suggested in the doctrine that a more appropriate approach to distinguishing between torture and cruel treatment should be deducing whether it is committed with intention and one of the aforementioned specific purposes required for torture.[48] Similar to torture, the assessment of the seriousness of the suffering caused by cruel treatment is relative and depends on objective factors such as the factual circumstances in which it takes place or duration, as well as subjective effects of the act or omission on the victim based on personal situation, such as the victim's age, sex and health.[49] Regarding the the question as to whether withholding of consent constitutes an action or omission, refer to the discussion later under IHRL on the duty of omission and fulfilment. Here it is sufficient to note that withholding of consent could constitute a cruel treatment where the conflict party has no particular purpose, when it leads to serious harm and suffering and deprives the affected civilians of relief supplies.

3 Breaches of IHRL Obligations

Since IHL prohibits basically grave breaches of IHRL, the aforementioned offences are also prohibited under IHRL. Relevant in the context of provision of humanitarian relief are beside the right to life also economic, social, and cultural rights like rights to food, water and sanitation, accommodation and health since these rights secure the basic needs of individuals in situations of humanitarian crisis.

In respect to the application of IHRL provisions along with IHL in situations of armed conflict, we can recall what was said in the beginning: IHRL may either complement and reinforce or overlap and provide new aspects to the contents of the provisions under IHL. Where the content of IHRL is uncertain for situation of armed conflicts or (for the few cases) it contradicts IHL provisions, it has to be referred to IHL as the *lex specialis* which establishes the substance of that human right.

48 KÄLIN/KÜNZLI, p. 378; On the different theories for the distinction between torture and inhuman treatment see KÄLIN/KÜNZLI, p. 377 f.

49 KÄLIN/KÜNZLI, p. 387.

3.1 *Prohibition of Torture and Other Cruel, Inhuman Treatment*

3.1.1 Legal Sources and Definition

The prohibition of torture and other cruel, inhuman treatments are mentioned in Article 7 of the ICCPR as well as in the European, American, African, and Asian regional human rights conventions.[50] There are also specific conventions such the UN Convention against Torture which exclusively provide regulations on that topic. Those prohibitions are (as under IHL) absolute and non-derogable. They must therefore be respected under all circumstances, which means particularly for situations of armed conflicts, that military necessity cannot justify acts inconsistent to those prohibitions.[51]

Torture and inhuman treatment are defined under ICCPR and the regional human rights conventions similarly to IHL, we can therefore refer to the definition provided before.[52] However, the definition of torture and inhuman treatment according to the UN Convention against Torture is, as already mentioned, different to the other conventions, it does not include acts which are committed by non-State actors without any governmental involvement.[53] Thus, in situations where withholding of consent of non-State armed groups amounts to an act of torture or other ill treatment, this will not constitute a breach of the prohibitions of the UN Convention against Torture, but of all other human rights conventions mentioned before. The conditions under which withholding of consent amounts to torture or inhuman treatment, namely for what purpose and with what intention, and what distinguishes these two prohibitions from each other, have already been outlined. Thus, only the particular aspects of IHRL will be discussed here, such as the fact that the prohibition of torture and inhuman treatment includes, in addition to the duty of omission, the duty to act, which can be violated by withholding consent to relief (3.1.3), and when the degree of pain or suffering exceeds the threshold of the prohibition

50 Article 3 of the ECHR, Article 5 of the American Convention on Human Rights, Article 5 of the African Charter on Human and Peoples' Rights, Article 8 of the Arab Charter on Human Rights and in Article 14 of Human Rights Declaration by the Association of Southeast Asian Nations.

51 Instead of many, KÄLIN/KÜNZLI, p. 391; ICRC Commentary on the GC I, para. 581 ff.

52 The duty to fulfil is set out in the 1984 UN Convention against Torture and can be further derived from the general prohibitions of torture and inhuman treatment under ICCPR and the regional conventions, see on this KÄLIN/KÜNZLI, p. 335.

53 The reason for this restriction in the Convention against Torture is the fact that the Convention links the concept of torture to extensive State obligations, such as punishment or extradition obligations. Member States wouldn't not have accepted those obligations if they would have also included torture of non-State actors; see on the whole, KÄLIN/KÜNZLI, p. 368.

of torture and inhuman treatment in the light of the practice of human rights bodies (3.1.4).

3.1.2 Consideration of Degrading Treatment

It should be noted that most human rights conventions mention degrading treatment together with torture and inhuman treatment. Degrading treatment (also prohibited as 'outrages upon personal dignity' under IHL and international criminal law[54]) refers to interventions that humiliate or degrade a person's physical or mental integrity. The suffering of the victim caused by an act or omission has therefore to lie primarily in the degradation.[55] An intention to humiliate or debase is however not required.[56]

In situations where consent to sanitary facilities is withheld, this can indeed lead to humiliation and degradation of the civilian population, for example when they have to relieve themselves in public. However, since relief operations include a variety of provisions, the suffering of the civilian population caused by withholding of consent to relief operations does not lie in general and primarily in the debasement of personal dignity. Withholding of consent to relief can therefore not qualify (holistically) as a degrading treatment, but rather as an act of inhuman treatment or torture which may include also degrading elements in situations where sanitary facilities are deprived. This understanding corresponds also with the definition of the ICTY, that 'outrages upon personal dignity' are a subset of the broader concept of inhuman treatment.[57] ECtHR alsoconsidered in its practice whether a treatment may amount to a degrading treatment after deciding that an act was not sufficiently severe enough to amount to inhuman treatment or torture.[58] Accordingly, it can be said that degrading treatment constitute the baseline for a violation of Article 3 ECHR and elements of debasement of dignity can be included in acts which amount to inhuman treatment or torture, while qualifying an act as degrading treatment for itself is considered when the requirement of the two other offences are not met.[59] The offence of degrading treatment is therefore not discussed further in the context of withholding of context. However, the

54 Common Article 2 and Aritcle 4(2)(e) AP II; Article 8(2)(c)(ii) Rome Statute; see on this SIVAKUMARAN, Non-International Armed Conflict, p. 263.

55 KÄLIN/KÜNZLI, p. 378 f.

56 See ECtHR, *Price v. UK*, para. 30.

57 ICTY, *Prosecutor v Aleksovski*, para 26; see on this SIVAKUMARAN, Non-International Armed Conflict, p. 263 with further references.

58 For example, ECtHR, *Tryer v. UK* and Campell and *Cosans v. UK*.

59 LONG, p. 17 ff.

particular affect the deprivation of sanitary facilities may have on the dignity of civilians is sufficiently considered by the human right to water and adequate sanitary, which will be outlined later.

3.1.3 Duty of Omission and Duty to Fulfil

3.1.3.1 *In General*

The prohibition of torture and inhuman treatment requires not only the omission of acts that may constitute serious attacks on the physical or mental integrity of a person (duty of omission), but also, in certain situations, the fulfilment of specific obligations (duty to fulfil) in order to ensure effective and comprehensive protection. The prohibition of torture and inhuman treatment may therefore be violated by an action or an omission.[60]

3.1.3.2 *Withholding of Consent as an Act of Action and Omission*

Irrespective of how the consent is withheld, explicitly or implicitly by an action or omission, withholding of consent to relief operations always includes both elements, an action of withholding and an omission of not providing the required relief by consenting to the relief offered. Suffering and pain of the civilian population is namely not constituted by the act of withholding of consent only, but also, that with it, consent is not provided so that the required provision of relief could take place. This is particularly evident in situations where there is no reaction from authorities, which is for example the case in situations of failed States. Even though consent has not been withheld by those authorities, the affected civilians will nevertheless experience suffering and pain, since relief can only be provided if consent is given or can be assumed. Thus, in situations of withholding of consent, it is not the act of withholding solely that causes the suffering and pain of the civilians, but also the missing consent and provision of relief which it includes. Withholding of consent has therefore to be categorised as an act of action and omission at the same time.

It is undisputed, that where withholding of consent to relief operations is committed with the required intention and purpose, as mentioned before, and causes pain and suffering that amounts to a severity of torture and inhuman treatment, that it constitutes an action that breaches the duty of omission of those prohibitions. However, in order for the withholding of consent to also constitute a violation, in that the parties to the conflict do not provide consent respectively do not provide relief by consenting to the relief which is offered, it is required that the conflict parties also have a corresponding duty to fulfil

60 Kälin/Künzli, p. 394.

under the prohibition of torture and inhuman treatment. A duty to provide relief (either by themselves or in situations where they are not able to do so, by enabling the provision of relief from outside), exists for the conflict parties already under IHL. The question here is, however, if such a duty also exists under the prohibition of torture and inhuman treatment.

3.1.3.3 *A Duty to Fulfil and Provide Relief*

A duty to fulfil is generally agreed under the prohibition of torture and inhuman treatment in circumstances of detainment, where the concerned persons are under State custody and unable to fulfil their own needs. For example, in cases of a detained sick person, ECtHR has called, based on several occasionson the prohibition of torture and inhuman treatment under Article 3 of ECHR, that the concerned State must ensure that the conditions of the detainment are adequate to the special needs of those persons.[61] Duty to fulfil is however unsettled for situations outside detainment. In other words, it is questioned whether there is in situations other than detainment a duty to provide services based on the prohibition of torture or inhuman treatment.[62] According to the view of KÄLIN/KÜNZLI such a duty can be exceptionally given outside situations of detainment. The refusal of a State to help people in need may constitute not only a violation of the respective subsistence rights, but also an inhuman treatment, when the concerned State could have had easily provided the necessary services such as food, shelter, health care, etc. and when the situation of emergency causes suffering of the affected persons to an extent that exceeds the threshold of the prohibition of inhuman treatment.[63] These conditions are met in situations of humanitarian emergencies during armed conflict where consent to relief is withheld: the affected civilian population does not only suffer undue hardship which may exceed the threshold of inhuman treatment, as it will be outlined later, but the State is also in a situation to provide the required relief easily by consenting to the offered relief actions.

A duty to fulfil can, according to the author, also be based on the fact that the situation of civilians in humanitarian crises during armed conflicts is comparable to that of persons deprived of their liberty, both being unable to meet their own needs and dependent on those under whose control they are for access to essential goods such as food, water, or medicine. Thus, based on both argumentations, it can be agreed that the conflict parties also have, under the prohibition of torture and inhuman treatment, a duty to provide relief by

61 For example, ECtHR, *Mechenkov v Russia*, para. 50; see KÄLIN/KÜNZLI, p. 394 f.
62 KÄLIN/KÜNZLI, p. 395.
63 KÄLIN/KÜNZLI, p. 396.

enabling the provision from outside. In other word, the conflict parties can breach those prohibitions by not consenting to offered relief in situations where they are not able to provide themselves, or through others, the required relief.

3.1.4 Severity of Suffering and Pain

People in situations of humanitarian crisis during armed conflicts are generally in need of food and have no access to clean water or sanitation, they are displaced and live without housing and struggle to survive communicable diseases or injuries.[64] Being without adequate food, water or medical treatment, even for "only" several days in situations of detainement, according to human rights bodies, is constituted as pain and suffering that attains the severity of inhuman treatment.[65] This assessment is also applicable to civilian populations without adequate relief supply during humanitarian crises in armed conflicts, since their situation is, as mentioned before, comparable to the situations of persons deprived of liberty. It can therefore be argued that not providing adequate supplies causes in both situations at least similar severities of pain and suffering. According to the opinion of the author, for situations of humanitarian crisis without relief it can be even argued that the civilian population in humanitarian emergency suffers an undue hardship which amounts to the severity of torture, since they lack essential supplies which are required for their survival often for long and indeterminate periods of time. This classification is all the more agreeable in view of the recent jurisdiction of the ECtHR, which in recent years has steadily reduced the threshold for the required severity of pain or suffering an intervention of torture causes.[66] In the case *Selmouni v. France*, the ECtHR stated that certain acts, which in the past were classified deliberately not as torture but as inhuman or degrading acts, must now be treated more strictly because of the increasing high standards required to protect human rights:

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64 For example, in Yemen, see on this https://www.mercycorps.org/blog/quick-facts-yemen-crisis (last visited 31 August 2023).

65 On no food and water for several days: UN Human Rights Committee, *Miha v. Equatorial Guinea*, para. 6.4; Inter American Court of Human Rights, *Neptune v. Haiti*, para. 137; African Commission on Human and Peoples' Rights, *Achutan and Amnesty International v. Malwai,* para. 7; ECtHR, *Keenan v. United Kingdom*, para. 115; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation v. Nigeria*, para. 27; African Commission on Human and Peoples' Rights, *Huri-Laws v. Nigeria*, para. 41.

66 Kälin/Künzli, p. 380 f.

> The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture. However, having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions," the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[67]

In view of these aspects, it can therefore be concluded that withholding of consent may cause pain and suffering that exceeds the threshold of inhuman treatment. Where the civilian population needs relief supplies for a long and undefined period of time, it can be even argued that the intensity of pain and suffering may even amount to torture, if the consent was also withheld with a particular purpose of torture such as to discriminate or punish the civilian population.

3.2 *Prohibition of Discrimination*

The prohibition of discrimination in IHRL is the general equivalent to the prohibition of adverse distinction under IHL. The prohibition of discrimination is found in all major universal and regional human rights treaties.[68] Accessory discrimination is primarily prohibited, which requires that the enjoyment of the rights and freedoms set forth in the respective treaties shall not be deprived on the grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[69] Breaches of these prohibitions therefore require a discrimination in relation to a particular human rights guarantee.[70] Independent respectively autonomous

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67 ECtHR, *Selmouni v. France*, para. 101; see on this KÄLIN/KÜNZLI, p. 380 f. with further examples and references.

68 ICRC Stuy on Customary IHL, Rule 88.

69 Articles 2(1) and 26 ICCPR as well as Article 2(2) ICESCR, Article 14 ECHR; further also in Article 24 of the American Convention on Human Rights, Articles 2 and 3 of the African Charter on Human and Peoples' Rights, Article 25 of the Arab Charter on Human Rights; see KÄLIN/KÜNZLI, p. 408 and pp. 410 ff.

70 That guarantee has to be provided under the particular treaty or according to the practice of the ECtHR, the prohibition of accessory discrimination under Article 14 ECHR can be invoked if the guarantee is provided for in national law, see on this ECtHR, *E.B. v. France*, paras. 49 ff. with further references; on the overall topic, see KÄLIN/KÜNZLI, p. 410 f.

prohibitions of discrimination which protect against discrimination even if there is no human right affected, are rare in IHRL treaties. On a universal level, there is only Article 26 of the ICCPR which imposes a refrain from discrimination, even if there is no other affected guarantee of ICCPR.[71] Like the prohibition of adverse distinction in IHL, IHRL does not prohibit distinction as such. In order to be considered as discrimination under IHRL it is further required that the distinction cannot be based on reasonable and objective grounds.[72]

It has been already mentioned before that where consent to relief operations is withheld (because it concerns areas where the civilians live under the control of the opposing conflict party or it is known that the opposing conflict party enjoys the particular support of the civilian population), the withholding is based on criteria belonging to the status of the concerned civilian population and cannot be justified under reasonable and objective grounds. This would constitute a prohibited discrimination under Article 26 ICCPR. Where such withholding of consent affects substantive human rights (as outlined in the following) of the civilian population such as the right to an adequate accommodation, sanitations, food or the right to essential health, medication, and medical services as it is enshrined in Article 11 and 12 of the ICESCR, it could form also an accessory discrimination in connection with Article 2(2) ICESCR.

3.3 *Fundamental Human Rights Guarantees*

Finally, situations of withholding of consent to relief operations may also breach fundamental guarantees for the existence of the civilian population such as the right to life (3.3.1) or substantive rights like right to food, water, and sanitations and to adequate accommodation (3.3.2) or the right to health which includes rights to medication and medical services (3.3.3). It should be noted that those rights also include a duty to fulfil which can be breached in situations of humanitarian crisis by withholding of consent to relief respectively by not providing the required consent to provision of relief. With regard to social, economic, and cultural rights such as right to food, water, accommodation and health, the ICESCR requires that a minimum standard has to be guaranteed irrespective of a State's available resources. Article 2 of the ICESCR explicitly mentions that for achieving the rights recognised in the Covenant steps must be taken "individually and through international assistance and cooperation." Thus, in situations of humanitarian crisis where own resources are

71 On the content of Article 26 ICCPR, see HRC, *Zwaan-De Vries v. The Netherlands*; see KÄLIN/KÜNZLI, p. 412.

72 KÄLIN/KÜNZLI, p. 414 f. with further references.

insufficient, international relief has to be taken into consideration in order to provide the minimum standard required by the ICESCR.

3.3.1 Right to Life

Article 6(1) ICCPR and equivalent provisions in regional conventions,[73] enshrine that every human being has an inherent right to life, which should be protected by law and not arbitrarily deprived.[74] The right to life is considered as non-derogable under IHRL treaties and is applicable at all times.[75] However, this does not exclude all acts of killings during armed conflicts. It is required that the term "arbitrary deprivation of the right to life" has to be interpreted, as mentioned before, under the light of IHL as *lex specialis*. Consequently, deprivation of the right to life is in situations of armed conflicts, arbitrary when it is not allowed under IHL.[76]

Attacks against civilians are generally prohibited under IHL. Where withholding consent results in the death of civilians due to the deprivation of assistance essential to their survival, it would therefore constitute a prohibited and thus arbitrary violation of the right to life under IHL. This is particularly true for situations where withholding of consent to relief is applied with the intention to cause starvation which is explicitly prohibited as method of warfare under IHL.[77] Further, the right to life requires the duty to fulfilment. In doctrine and jurisprudence, a duty to perform is accepted for situations of detention or where a State measure has led to a situation in which the persons concerned are unable to satisfy themselves with subsistence goods. Persons in such situations have to be provided with services and goods which are essential for their survival such as food, water and adequate medicine.[78] As mentioned before, the situation of detained persons and those affected by government measures which make it impossible for them to satisfy their subsistence needs, can be

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73 For example, Article 2 ECHR, Additional Protocol 6 and 13 to ECHR, Article 4 AMHR, Article 4 ACHPR, see on this KÄLIN/KÜNZLI, p. 309 with further references.

74 For example, the ICCPR, Article 6(1); ACHR, Article 4; AfCHPR, Article 4. The ECHR, Article 2, does not use the notion "arbitrary" but provides a general right to life, giving an exhaustive list of circumstances when a deprivation of the right to life may be lawful; on the whole see ICRC Study on Customary IHL, Rule 89.

75 Article 4(2) ICCPR; Article 27(2) ACHR. Article 15(2) ECHR states that the right to life is non-derogable, except for a "lawful act of war" in a situation which amounts to armed conflict. The AfCHPR does in general not provide any derogation for its provision in state of emergency.

76 KÄLIN/KÜNZLI, p. 201.

77 KÄLIN/KÜNZLI, p. 328 f.

78 For example, HRC, *Lantsova v. Russia*, para. 9.2; ECtHR, *Tais v. France*, para. 93 ff; for the overall topic, see Kälin/Künzli, p. 345 f. with further references.

compared to the situations of civilians in humanitarian crises during armed conflicts. Withholding of consent, which leaves the affected civilians without the required relief of substantive goods essential to their survival, therefore causes also a breach of the right to life with regard to the duty of fulfilment.

3.3.2 Substantive Human Rights

The scope of the human rights protection of life is not limited to minimising the probability of persons becoming victims of attacks and killings. Enjoying an "adequate standard of living"[79] includes access to essentials such as food (3.3.2.1), water and sanitation (3.3.2.2.) as well as adequate accommodation (3.3.2.3), which are all equally relevant for the survival and existence of a person.[80]

3.3.2.1 *Right to Food*

The human right to food is enshrined in Article 11 of the ICESCR and provides that every human being has a right to adequate food, recognising the fundamental right to be free from hunger. The Special Rapporteur explains the right to food as a:

> right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensure a physical and mental, individual and collective, fulfilling and dignified life free of fear.[81]

This definition is similar to the one provided by the Committee on Economic, Social and Cultural Rights on the core elements of the right to food in its General Comment No. 12. In its Comment the Committee reminds us that even if the right to adequate food has to be realised progressively, in times of natural or other disasters, there is a core obligation to take the necessary actions to mitigating and alleviating hunger.[82] The Committee mentions therefore in Paragraph 19 of the General Comment No. 12 that "the prevention of access

79 On substantive aspects for adequate standard of living see Article 11(1) and (2) ICESCR.

80 KÄLIN/KÜNZLI, p. 352 f.; on the importance during armed conflicts see AKANDE/GILLARD, Oxford Guidance, p. 23 with further references.

81 Report of the Special Rapporteur on the right to food, Critical perspective on food systems, food crises and the future of the right to food, p. 5.

82 CESCR, General Comment No. 12, para 8.

to humanitarian food aid in internal conflicts or other emergency situations" through the State is considered a violation of the right to adequate food.[83]

Therefore, the right to food requires first and foremost the duty to refrain from acts which may impede access to adequate food and not to create situations where persons have to suffer from hunger.[84] Withholding of consent to food supplies for the civilian population or starvation of the civilian population as a method of warfare are acts that are contrary to the right to food and particularly, the right to be free from hunger. Further, the right to food in situations of humanitarian crises require, as mentioned before, a duty to fulfil and act in order to mitigate and alleviate hunger. This is particularly required in situations where civilians are not able to fulfil their own essential food needs, including situations of detainment and humanitarian crises during armed conflicts.[85] By not providing consent to food supplies and not enabling access to adequate food, withholding of consent would also breach the duty to fulfil arising from the right to food, particularly in view of Article 2 of the ICESCR, which requires that international assistance and support has to be applied to achieve the obligations under that Covenant.[86]

The UN Assistant Secretary-General for Human Rights has for example concluded in 2018 that Myanmar breached its obligation to protect civilians from hunger by resorting to starving the Rohingya people in Rakhine in order to carry out an ethnic cleansing.[87] The UN Independent International Fact-Finding Mission on Myanmar reaffirmed those findings in its report in 2019 and stated further with regard to the situation of the Rohingya that, "the Government's movement restrictions, deprivation of food and denial of humanitarian relief are all having severe effects on the right to food and health of Rohingya," and that those acts "constitute retrogressive measures that violate its obligations under ICESCR and CRC."[88] Also, the Security Council issued the problem of hunger and conflict in a thematic manner in its landmark Resolution 2417 (2018) and outlined therein the vicious circle between food insecurity, hunger and armed conflicts. The Council reiterated in that regard particularly the duties of the conflict parties to protect civilian populations and to allow

83 CESCR General Comment No. 12, para. 12.
84 KÄLIN/KÜNZLI, p. 355.
85 KÄLIN/KÜNZLI, p. 356 with further references.
86 See to Article 2 ICESCR.
87 Report of the Special Rapporteur on the right to food, Critical perspective on food systems, food crises and the future of the right to food, p. 6.
88 Independent International Fact-Finding Mission on Myanmar, p. 5.

passage for humanitarian assistance.[89] Due to its importance to the subject of the present book, this resolution will be discussed in more detail later.[90]

3.3.2.2 *Right to Water and Sanitation*

In situations of humanitarian crisis during armed conflicts, the affected civilian population often lack access to sufficient and clean water and sanitary facilities, such as toilets, showers, and handwashing facilities. This could be because water supply and sanitation system has been damaged or destroyed by the ongoing armed conflict or because they do not exist where the civilian population has fled. Access to water and basic sanitation isessential for the life, health, and human dignity of the affected civilian population. Lack of access to water may cause dehydration and water-related diseases. Insufficient water and sanitation may further lead to low hygiene standards which particularly increases vulnerably to epidemic outbreaks. Water, sanitation, and hygiene supplies (also known as WASH assistance) are therefore critical elements in the relief during humanitarian emergencies.[91]

Although access to water and sanitation is recognised as a basic human need, it is surprising that neither international nor regional human rights conventions have recognised the human right to water or access to adequate sanitation.[92] Recent developments in IHRL, however, show a reconsideration in this area: for example the latest specific human treaties such as the convention of the Rights of the Child or the UN Disability Rights Convention provide the right to water for the protected persons.[93] A right to water is also recognised by the Committee on Economic, Social and Cultural Rights in its General Comments that the right to drinking water and access to sanitation is (at least implicitly) included in the right to housing, food and health.[94] This opinion is also shared by the political bodies of the UN. This can be seen, for example, in the fact that the mandate of the Special Rapporteur on the right to food has been extended to the right to drinking water and the Human Rights Council mandated in 2008 an independent expert on the human right

89 ZAPPALÀ, p. 881.

90 See Chapter 18 II 5.2 (5.2.4).

91 The Sphere Project, p. 97–99.

92 Report of the independent expert on human rights and international solidarity Rud Huammad Rizki, UN Doc. A/HRC/15/32, 27 September 2010.

93 Article 24 CRC, hereto also the Committee on the Right of the Child, General Comment 15 (2013), paras. 48 f.; hereto KÄLIN/KÜNZLI, p. 358 with further references.

94 For example, CESCR, General Comment 4 (1991), para. 8; General Comment 14 (2000), para, 4 and General Comment 15 (2002), paras. 3 and 12; see KÄLIN/KÜNZLI, p. 350.

to access drinking water and sanitary facilities.[95] The UN General Assembly also recognised in 2010 in its Resolution 64/292 that the right to safe and clean drinking water and sanitation is a human right indispensable to the full enjoyment of life and all other human rights.[96] Similar developments in the understanding of the right to water and sanitary facilities as fundamental human right, included in the right to food and to an adequate standard of living, can also be seen at the regional level.[97] Those developments assure therefore that the right to water and access to sanitation have become legally established human rights which can be breached in situations of withholding of consent during armed conflicts, even though they are not enshrined in international and regional human rights treaties such as the ICESCR.[98]

Since the right to water and to sanitary facilities is considered to be included in other existing human rights, its scope overlaps with that of many other human rights such as the right to food, adequate accommodation, health, life as well as the prohibition of inhuman and degrading treatment.[99] It requires continuous availability and access to sufficient water of appropriate quality for drinking, food preparation, personal hygiene and cleaning purposes, as well as access to sufficient sanitation facilities as close as possible to each person's place of residence, work and school. At the centre of the latter claim is the protection of human dignity and the right to privacy, which are violated at their core when people are forced to satisfy their needs in public.[100] Accordingly, the right to water and sanitation facilities requires refraining from acts which may hinder or affect access to water and adequate sanitation.[101] Withholding of consent to the provision of relief which includes water for drinking, cooking and personal and domestic hygiene of adequate quality as well as sanitation and hygiene supplies would therefore breach the right to access water and sanitation. Further, it requires acting and providing as a minimum standard a sufficient and adequate quality of water and sanitation facilities, particularly in situations where persons are not capable of fulfilling their own needs and

95 Human Rights Commission, Resolution 2001/25, para. 9.

96 UN General Assembly, Resolution 64/292.

97 At the European level, the Committee of Ministers of the Council of Europe has for example recognised in the Water Charter a right to sufficient quantities of water to meet the basic needs of every person, see Rec(2001)14, Art. 15; see Kälin/Künzli, p. 350 f. with further references.

98 See KÄLIN/KÜNZLI, p. 360.

99 See on this the Report of the independ expert on human right and acces to drinking water and sanitation, 1st July 2009, UN Doc. A/HRC/12/24, para. 7 ff.

100 On the overall topic, see KÄLIN/KÜNZLI, p. 360 f.

101 KÄLIN/KÜNZLI, p. 362.

depended on provision from outside.[102] Thus, where relief supplies of water and sanitation are withheld and thus, not enabled to be provided to civilians in need during armed conflicts, it is (similar to the right to food) a breach of the duty to act on the right to water and sanitary, particularly in view of Article 2 of the ICESCR for not accepting international assistance to fulfil their obligation under the Covenant.

3.3.2.3 *Right to Adequate Accommodation*

Adequate accommodation is a basic human need. In situations of humanitarian crisis, the affected population is often displaced, in need of basic shelter and living under conditions which have fallen below commonly accepted minimum humanitarian standards.[103] Sheltering persons affected by armed conflicts or disasters is therefore a core humanitarian activity to prevent excessive mortality. Beyond survival, shelter is also necessary for safety and protection from cold and other environmental factors that are harmful to health, to promote resistance to diseases as well as preserving human dignity and sustaining family and community life.[104] A human right to an adequate accommodation is enshrined inter alia in Article 11 of the ICESCR.[105] It includes beside sufficient space and appropriate siting, the availability of accommodation that provides adequate protection.[106] An adequate accommodation includes also, as already mentioned, access to drinking water and sanitary facilities.[107]

Right to adequate accommodation requires respecting people's rights to build or have housing in a manner which most effectively suits their culture, needs, and wishes.[108] It further requires refraining from acts which may prevent access to accommodation. Thus, withholding of consent to relief that would provide adequate shelter in situations of humanitarian crisis that correspond to the urgent needs of the civilian populations, would breach the right to adequate accommodation. Emergency situations further establish a minimum obligation that emergency shelters must be provided that protected people in need against environmental influences and other dangers of survival.[109]

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102 KÄLIN/KÜNZLI, p. 362 with further references.

103 ECHO, p. 3 and 5 ff.

104 ECHO, p. 3; The SPHERE PROJECT, p244.

105 Similar to the right of respecting home, part of the right to a private life enshrined for example in Article 8 of the ECHR, which offers particular protection against expulsion, see KÄLIN/KÜNZLI, p. 365.

106 ECHO, p. 3; KÄLINZ/KÜNZLI, p. 363.

107 KÄLINZ/KÜNZLI, p. 363.

108 OHCHR, p. 17.

109 KÄLIN/KÜNZLI, p. 364 and 366.

By not enabling the provision of required shelter to the civilians in situations of humanitarian crisis, withholding consent would therefore also constitute a breach of the duty to fulfil arising from the right to adequate accommodation.

3.3.3 Right to Health

The right to health, as it is enshrined for example in Article 12 of the ICESCR[110], requires providing circumstances that allow the highest state of health. The scope of the right to health overlaps with the scope of many other human rights. For example, breaches to the right of food, accommodation or water can also affect the right to health of a person.[111] Due to the complexity of factors which can influence health, the content of the right to health is not fully explored.[112] According to the Committee on Economic, Social and Cultural Rights, it provides a right to access qualitatively and quantitatively sufficient public health facilities and health care as well as medicines. Accordingly, in order not to breach the right to health, it is required that access to health facilities and care is not impeded.[113] For situations of armed conflicts, it is agreed that this includes besides the prohibition of destruction of health infrastructure and attacks on medical personnel, any obstruction of medical assistance and transport. Withholding of consent to provision of medicines and medical treatment to besieged populations, particularly to those who are injured or suffer disease and are therefore in urgent need of medical care, as well as deliberate interruptions to water, food and other supplies, which interrupts functionality of health facilities, would constitute a prohibited obstruction according to the right to health.[114]

The right to health also includes a duty to provide at least a minimum standard of health care, unless it can be demonstrated that, despite serious use of resources and the use of international support, the required minimum could

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110 Article 12(1) of the ICESCR: "The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Right to heal is also found in other human rights treaties, for example in Article 24 CRC; see KÄLIN/KÜNZLI, p. 367 with further references.

111 KÄLIN/KÜNZLI, p. 367.

112 KÄLIN/KÜNZLI, p. 368.

113 Committee on Economic, Social and Cultural Rights, General Comment 14 (2000), paras. 7 ff. and General Comment 22 (2016) paras. 5 ff.; on the overall topic, see KÄLIN/KÜNZLI, pp. 368 with further references.

114 KÄLIN/KÜNZLI, p. 370 in reference to GCs and APs; WHO Media News, Dr Ala Alwan, WHO Regional Director for the Eastern Mediterranean, "Delivering health care in crises: attacks on health care and the need for compliance to international humanitarian law," available at http://www.emro.who.int/media/news/attacks-on-health-care-and-need-for-compliance-to-international-humanitarian-law.html (last visited 31 August 2023).

not be achieved.[115] An exclusion is therefore not possible in situations of withholding of consent to relief operations where the affected civilian population is left without medical care, even though adequate health care was offered. Withholding of consent would therefore also constitute a breach arising from the duty to provide of the right to health.

An obligation to provide medical care has been repeatedly confirmed by the jurisdiction in relation to persons under detention.[116] As already mentioned, the situation of persons in humanitarian crises can be compared with those in detention, which is why, withholding of consent to medical relief would also constitute a violation of the duty to fulfil under the right to health for this reason.

4 Breaches under International Criminal Law

Arbitrary withholding of consent is not explicitly mentioned in the Rome Statute as an international crime. However, withholding of consent may nevertheless lead to criminal responsibility, if it constitutes an *actus reus* of an offence which is criminalised under the Rome Statute[117] as a war crime (4.1), crime against humanity (4.2) or genocide (4.3) and is committed with a respective intention.[118]

4.1 *Arbitrary Withholding of Consent as a War Crime*

4.1.1 War Crimes in General

War crimes are serious violations of IHL. Article 8 of the Rome Statute mentions various offences which are considered as war crimes if they are committed intentionally, in the context of an armed conflict and addressed against persons protected under IHL.[119]

115 KÄLIN/KÜNZLI, p. 373.

116 For example, a duty to provide medical care has been also mentioned in the context of the prohibition of inhuman treatment by the ECtHR, *Wenner v. Germany* , para. 54 ff; see on the overall topic, KÄLIN/KÜNZLI, p. 373 with further references.

117 FARAQUHAR, p. 33; ROTTENSTEINER, p. 555, 558 and 563.

118 Article 30 Rome Statute, Intention requires general knowledge oft he circumstances of a conduct and the awareness of the consequences which may occur in case of the ordinary course of events and that the person means to engage in the conduct and cause those consequences. Some offences require particular intentions. Theroretically, attempts to commit international crimes can also be punished, but they have been rarely subjected to the international level. This aspect will therefore not be discussed.

119 ICTY, *Prosecutor v. Tadíc*, para. 573; on the overall topic, see ROTTENSTEINER, p. 558.

In case of arbitrary withholding of consent to relief operations in situations of non-international armed conflict, the connection between the conduct and the armed conflict is evident. Also, the requirement that the offence has to be against persons protected under IHL is given as withholding of consent affects civilians which are protected under IHL. For situations of non-international armed conflict, this is enshrined in Common Article 3 of the GCs and Article 13 AP II, stating "persons taking no active part in the hostilities" are particularly protected.[120] It remains to be determined, whether the offences and intentions of war crimes mentioned under Article 8 of the Rome Statute may be constituted through arbitrary withholding of consent.[121]

To consider in this regard are in particular murder,[122] torture or inhuman treatment (4.1.2) in the sense of Article 8(2)(c)(i) Rome Statute.[123] According to Article 8(2)(c) Rome Statute these offences may occur during non-international armed conflicts and are also forbidden under Common Article 3(1)(a) of the GCs and Article 4(2)(a) AP II for situations of non-international armed conflict.[124] The crime of starving the civilian population as a method of

120 See ICC, Elements of crimes, Article 8(2)(c), p. 31 ff.

121 The offences which may lead to a war crime are differentiated in Article 8 of the Rome State between grave breaches of the Geneva Conventions and other serious violations of IHL. The enumeration of grave breaches of the Geneva Conventions in the Statute are not relevant here as it is only a limited set of violations of the Geneva Convention law which apply to international armed conflict. But the concept of other serious violations of IHL is broader and mentions also serious breaches of IHL which may occur in non-international armed conflicts; See on this Article 85(5) AP I, DÖRMANN, p. 18. ÖBERG, p. 163 ff; See also ICRC Study on Customary Law, Rule 156. Originally, war crimes and grave breaches were two different concepts in international law. While war crimes are acts and omissions that are criminalised in international criminal law, grave breaches constituted a category of violations of the convention rules which were considered so serious that states agreed to enact domestic penal legislation. Over time, the line between the two concepts blurred. Article 85(5) of AP I provide that "grave breaches of [the Geneva Conventions and Protocol I] shall be regarded as war crimes" and the Rome Statute listed grave breaches as a category of war crimes under Article 8(2)(a); on the overall topic see, ÖBERG, p. 163 ff with further references. Today, there is no reason – logical nor legal – to separate these both types of crimes since the same rules of the ICC Statute are applicable, see on this DÖRMANN p. 128.

122 In the context of non-international armed conflict, it is employed with the term "murder," and in international armed conflict with the term "wilful killing." The ICTY stated regarding the difference between the two terms, that there "can be no line drawn between wilful killing and murder which affects their content," see ICTY, *Presecutor v. Delalic*, para. 422; on the overall topic, see ROTTENSTEINER, p. 558.

123 Definition of civilians according to Common Article 3 (1) of the GCs.

124 Similar offences are also prohibited in international armed conflict as „Torture or inhuman treatment" and wilfully causing great suffering or serious injury to body or health," see ROTTENSTEINER, p. 559.

warfare shold also be examined (4.1.3). This war crime is currently mentioned in the Rome Statute under Article 8(2)(b)(xxv) only for situations of international armed conflict. In December 2019, however, an amendment of Article 8 Rome Statute was finally adopted, according to which this crime also can be committed in situations of non-international armed conflict.[125]

4.1.2 Murder, Torture and Cruel Treatment

Murder is an intentional act or omission which causes the death of one or more persons. It constitutes a war crime if it is committed during armed conflicts and concerns the death of persons which are protected under IHL.[126] With regard to the arbitrary withholding of consent it can therefore be concluded that if civilians die as a clear consequence of withholding of consent to relief operations, for example when an area is completely blocked off from the outside world for a long period of time, this may constitute murder.[127] The intention of murder is given where the person withholding the consent had the will to kill or at least inflict serious crises in disregard of human life and the perpetrator was aware of the fact that death may occur in the ordinary course of events.[128]

Torture, according to Article 8(2)(c)(i) Rome Statute is similar to the definition in the UN Convention against Torture[129] and includes any intentional behaviour by which severe physical or mental pain or suffering is incited for purposes such as "obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind."[130] The Special Rapporteur on Torture even mentioned in his report, that the prolonged denial of food may constitute torture.[131] Thus, withholding of consent

125 See 4.1.3 (4.1.3.1).

126 ICC, Elements of Crimes (2011), Article 8(2)(c)(i), Element 1.

127 ROTTENSTEINER, p. 558.

128 ROTTENSTEINER, p. 559; In general, intention requires, according to Article 30 of the Rome Statute, that the perpetrator has awareness of the circumstances and consequences which will occur in the ordinary course of events. Thus, the element of intention to a war crime has to be affirmed when the person withholding the consent knows that there are civilians affected and is aware of the particular suffering of these persons which may result from the committed offence, see ROTTENSTEINER, p. 558.

129 Torture is defined there as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind".

130 ICC, Elements of Crimes (2011), Article 8(2)(c)(i), p. 32; hereto also KÄLIN/KÜNZLI, p. 377.

131 Report of the Special Rapporteur, Mr P. Koojimans, appointed pursuant to the Commission on Human Rights, UN Doc. Res. 1995/33, E/CN.4/1986/15, 19 February 1986, para. 119.

may lead to torture if it, for example, causes severe pain or suffering as a result of serious shortage of goods essential to the survival of the civilian population. Possible purposes in the case of withholding of consent may be intimidation or coercion. But the enumerated purposes in the Rome Statute are however not exhaustive, further such purposes can only be part of the motivation and not the predominant or sole reason of the conduct.[132]

Cruel treatment, on the other hand, includes intentional behaviour which causes less physical or mental pain than torture on one or more persons.[133] Further, unlike torture, it does not ask for a particular purpose for the conduct of the offence.[134] The ICTY established therefore, that all acts or omission to be found to constitute torture may fall also under the definition of inhuman treatment.[135] Thus, withholding consent to relief operations which is committed intentionally and causes suffering to the affected civilian population might be easier proved as cruel treatment rather than torture.[136]

4.1.3 Starvation of Civilians

4.1.3.1 *Amendment of Article 8 of the Rome Statute*

In May 2018, Switzerland presented the Assembly of State Parties to the Rome Statute of the International Criminal Court (ASP) a proposal to include starvation as a war crime in non-international armed conflicts into Article 8 of the Rome Statute. The decision on the proposal was deferred to the session of the Assembly in 2019 in order to have a thorough discussion of the proposal.[137] In August 2019, with the support of the Working Group on Amendments,[138] Switzerland then officially put forward its proposal to amend Article 8 of the Rome Statute and to include, as a crime, during non-international armed conflicts: "Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully

132 ROTTENSTEINER, p. 560.

133 ICC, Elements of Crimes (2011), Article 8(2)(c)-3, Element 1.

134 Definition of inhuman treatment, which has the same meaning as cruel treatment in the context of non-international armed conflict, in ICTY, *Proesecutor v. Delalic*, paras 442 and 443.

135 ICTY, *Proesecutor v. Delalic*, para. 509.

136 ROTTENSTEINER, p. 560.

137 ASP, Report of the Working Group on Amendments, Seventeenth Session of the ASP, ICC-ASP/17/35, 29, November 2018, p. 3.

138 The Working Group on Amendments was established by the ASP Resolution ICC-ASP/8/Res.6 for considering amendments to the Rome Statute and to the Rules of Procedure and Evidence, see Report of the Working Group on Amendments, Seventeenth Session of the ASP, ICC-ASP/17/35, 29, November 2018, p. 2.

impeding relief supplies."[139] On the 6 December 2019 the proposal was adopted unanimously by the Assembly.[140]

In this regard, it should be noted that any amendment to Article 8 of the Statute will enter into force only for States that have ratified the amendment and not for Statesthat have not ratified it. However, a State Party that ratifies the proposal will be subject to the amendment one year after the deposit of its instrument of ratification or acceptance, whether or not other States Parties have also ratified it.[141] At the time of writing, 12 States have ratified the amendment. The amendment itself entered into force on 14 October 2021, one year after the first State, New Zealand, had deposited its instrument of ratification in accordance with Article 121(5) of the Rome Statute.[142]

4.1.3.2 *Reasons for Including the Crime of Starvation for Situations of Non-international Armed Conflict*

The failure not to reproduce the war crime of starvation for situations of non-international armed conflict was criticised by several authors in the doctrine before the adoption of the amendment.[143] Even though the Rome Statute did prohibit starvation initially only for situations of international armed conflicts, it was generally accepted in the doctrine that the prohibition of starving civilians is part of the present customary international law and is therefore also prohibited in situations of non-international armed conflict.[144] This view is supported by the fact that starving civilians is also prohibited in Article 14 of AP II for non-international armed conflicts.[145] Further, during the drafting

139 The wording is similar to the version for international armed conflict in Article 8(2)(b)(xxv) of the Rome Statute. However, in contrast to Article 8(2)(b)(xxv), the proposed amendment does not include the formulation "as provided for under the Geneva Convention." This makes also sense, since the crime of starvation is based for non-international armed conflicts on the prohibition in AP II and as customary law as it is explained in the following section; see here to BARTELS, EJIL Talk Blog.

140 ASP, Resolution 'on amendments to article 8 of the Rome Statute of the International Criminal Court', ICC-ASP/18/Res.5.

141 UN Treaty Collection, Amendment to article 8 of the Rome Statute of the International Criminal Court (Intentionally using starvation of civilians), C.N.394.2020.TREATIES-XVIII.10.g, of 15 September 2020.

142 Status available at https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf (last visited 31 August 2023).

143 D'ALESSANDRA/GILLETT, p. 815 ff.; BARTELS, p. 281 ff.; VAN DEN HERIK/JÄRGERS/WERNER, Advisory Report, p. 27.

144 Article 8(2)(b)(xxx) Rome Statute; ICRC Study on Customary IHL, Rule 156; see also AKANDE/GILLARD, Oxford Guidance, p. 49; GILLARD, p. 34; ROTTENSTEINER, p. 560.

145 BARTELS, p. 296; AKANDE/GILLARD, Oxford Guidance, p. 36.

of the Rome Statute, there have been a considerable number of delegations which supported the inclusion of starvation on the list of war crimes for non-international armed conflicts.[146] Why it finally did not get included is unknown and is explained in the literature as an oversight and not as an actual opposition by the international community.[147] In this context, the doctrine refers to the formulation by ICTY which stated "(w)hat is inhuman, and consequently proscribed, in international wars, cannot but be inhuman and inadmissible in civil strife."[148] In other words, there is no valid reason why starvation should be treated differently in non-international armed conflict than in international armed conflict.

Switzerland argued in its proposal that "[s]tarving civilians is already a war crime under the Rome Statute in international armed conflicts," but since "the vast majority of contemporary armed conflicts are non-international in nature" this would constitute a gap in the Statute which "leaves civilians vulnerable." It further stated that "[t]he addition of the war crime would codify existing international humanitarian law" and with it "strengthen the international legal framework" which would send a strong signal to the victims.[149] In its non-paper submitted with its proposal in 2018 (revised on 20 September 2018), Switzerland referred inter alia to the Security Council Resolution 2417 (2018)[150] which (as it will be outlined later)[151] states that using starvation as a method of warfare may constitute a war crime and which, in this regard, makes no distinction based on the nature of the armed conflict.

Delegations of the other States generally agreed with the Swiss proposal throughout the meetings in 2018 and 2019, and that starving civilians in non-international armed conflict should become a war crime under customary international law.[152] However within the concerns, there was also inter alia the view that the second sentence of the proposal, namely "including wilfully impeding relief supplies," should be dropped, as it was doubted if this

146 BARTELS, p. 296 with further references.

147 BARTELS, p. 298 with further references.

148 ICTY, *Prosecutor v. Tadíc*, para. 119; see BARTELS, p. 282.

149 Permanent Mission of Switzerland to the United Nations, Amendment Proposal by Switzerland to article 8 of the Rome Statute of the ICC, 28 August 2019 in the Depositary Notification of the UN Secretary-General, 30 August 2019, Reference: C.N.399.2019.TREATIES-XVIII.10.

150 ASP, Eighteenth session, Report of the Working Group on Amendments, ICC-ASP/18/32, 3 December 2019, Annex III.

151 See Chapter 18 II. 5.2.

152 ASP, Eighteenth session, Report of the Working Group on Amendments, ICC-ASP/18/32, 3 December 2019, p. 3.

part could be regarded as part of customary international law.[153] Thus, in other words, it was questioned as to whether there was a sufficient *opinio iuris* and practice within the international community that considered impeding relief as an act which should lead to a criminal proceeding. This concern was, however, not further discussed at the later stage of the meetings.

4.1.3.3 *Elements of Starvation under the Rome Statute*

The use of starvation has been proved in the past to be an effective and therefore attractive method for States to demoralise the combatants of oppositional armed groups by not providing humanitarian relief in the areas under their control.[154] Article 8(2)(b)(xxv) of the Rome Statute for international armed conflicts and the adopted amendment for non-international armed conflicts state that "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies" constitutes a war crime. Thus, situations of arbitrary withholding of consent to humanitarian relief can be covered by the crime of starving civilians. But it is important to distinguish that the arbitrary withholding of consent is as such not prohibited by the Rome Statute, but only as a mean when it is used to cause starvation as method of warfare.[155] As in IHL, the term starvation is similarly understood under the Rome Statute: it does not only include the shortcoming of food and drink,[156] but also medications and other provisions which are essential for the survival of the civilian population.[157] According to the Rome Statute, it is not required that there is a result of the starvation, namely the death of one or more civilians.[158] Thus, when withholding consent concerns relief goods which are essential for the survival of the civilian population, it is sufficient to constitute a crime of starvation if it is committed with the intention to use it as method of warfare.[159] Like under IHL, the intentional element is important. Using starvation as method

153 ASP, Report of the Working Group on Amendments, Seventeenth Session of the ASP, ICC-ASP/17/35, 29, November 2018, p. 3.

154 KÄLIN, p. 352.

155 On the overall topic, see ROTTENSTEINER, p. 560; SCHOTTEN, p. 312.

156 See definition in the the Shorter Oxford English Dictionary, also referred by SANDOZ/SWINARSKI/ZIMMERMANN, para 4791; VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 18.

157 BARTELS, p. 287 with further references.

158 BARTELS, p. 293, with further references.

159 However, this offence will be difficult to prove in practice as it is not result but intention based, which will never be explicitly declared and therefore has to be proven based on circumstances and other facts, BARTELS, p. 293. ROTTENSTEINER, p. 560.

of warfare requires that the perpetrator's purpose must have been to cause starvation for gaining a military advantage (like for example control over a territory). Thus, cases where starvation is rather a secondary, unwanted consequence are not criminalised.[160] The requirement to prove such an intention for causing starvation may constitute (as mentioned for the prohibition of starvation under IHL)[161] an additional obstacle in practice to address situations of arbitrary withholding of consent as a breach of law.

4.2 *Withholding of Consent as a Crime against Humanity*

4.2.1 Crimes against Humanity in General

According to Article 7 of the Rome Statute, the therein referred offences constitute a crime against humanity if they are committed as a "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." In contrast to war crimes, crimes against humanity can also be committed outside situations of armed conflict and, therefore, do not require a connection between the offence and an armed conflict.[162] A "widespread" attack is given if an act is directed against a multiplicity of civil persons and not only isolated against a single victim, or even just a few victims. But even if the number of victims is small, the requirement of a "systematic" attack is fulfilled when several actions follow a specific pattern and are based on a common policy.[163] Thus, arbitrary withholding of consent to relief operations and the resulting deprivation of the civilian population from access to food and medicine may constitute a crime against humanity, if it either affects a larger amount of civilian people or if its committed as a part of a systematic attack against the civilian population based on a broader policy. On the other hand, there is no crime against humanity when the impediment of relief actions appears to be a random act such as a spontaneous looting of relief goods or attacks on relief convoys.[164] For an intention of a crime against humanity, it is further required that the person withholding the consent knows about the circumstances of the act, including the amount of civilians affected or the broader context behind the act.[165]

160 COTTIER, para. 224; ICC, Elements of Crimes and Rules of Procedure and Evidence, p. 203; WERLE, para. 1086.

161 See Chapter 13 2.3.

162 ROTTENSTEINER, p. 561; AKANDE/GILLARD, Oxford Guidance, p.49.

163 ROTTENSTEINER, p. 561.

164 ROTTENSTEINER, p. 561.

165 For example ICTY, *Prosecutor v. Tadíc*, para. 657; see ROTTENSTEINER, p. 562.

4.2.2 Offences, in Particular Torture and Extermination

Crimes against humanity, which are listed under Article 7 of the Rome Statute and may be committed through arbitrary withholding of consent include, for example murder,[166] extermination[167] and torture.[168] Murder as a crime against humanity corresponds to the definition of murder as a war crime. The only difference is that no relation to an armed conflict is required. For murder as a crime against humanity, it can therefore be referred to the definition of murder under IHL. In contrast, the definition of torture under a crime against humanity differs from torture as a war crime. In order to be considered a crime against humanity, torture has to take place "upon a person in the custody or under the control of the perpetrator." The term "under the control" is interpreted in a broader sense and does not just include persons in prison or other detention facilities, but also in a given territory. Withholding consent may therefore also constitute a crime against humanity, if it leads to torture of civilians who are under the effective control of the person withholding the consent, respectively the control of the military force to which this person belongs.[169] Finally, extermination is murder on a large scale.[170] It contains an element of mass destruction which distinguishes it from the offence of murder. Article 7 (2)(b) of the Rome Statute explicitly mentions that extermination "includes (…) inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of the population." Thus, withholding of consent can lead to an extermination if it constitutes a mass destruction and is committed with a corresponding intention.[171]

4.3 *Withholding of Consent as Genocide*

4.3.1 Definition of Genocide and Required Intention

Genocide is one of the most severe international crimes. In order to preserve its special status, it is not easily affirmed to any instances of mass killing.[172] According to Article 6 of the Rome Statute an act of genocide could be any of

166 Rome Statute, Article 7(1)(a).

167 Rome Statute, Aricle 7(1)(b).

168 Rome Statute, Arictle 7(1)(f).

169 ROTTENSTEINER, p. 562.

170 Unlike genocide, extermination also applies in situations in which only some members of a group are killed, ILC Draft Code of Crimes against Peace and Security of Mankind, Report of the International Law, Commission on the work of its forty-eighth session, 6 May-26 July 1996, 51 UN GAOR Supp. (No. 10), UN Doc. A/51/10, p. 97; on the overall topic, see ROTTENSTEINER, p. 562.

171 ROTTENSTEINER, p. 562; ICRC Study on Customary IHL, Rule 55.

172 ROTTENSTEINER, p. 563.

the offences mentioned in the Article (and discussed in the following), if they are "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[173]

National groups are understood in this context as a collective of people who share a legal bond based on common citizenship. Ethnic groups are generally defined as group of members who share the same language or culture. Racial groups are conventionally identified based on their hereditary physical traits in connection to a geographical region. Religious groups are members sharing the same religion, denomination, or mode of worship.[174] There is no number on how large the part of the targeted group has to be in order to fulfil the requirement of genocide. It is rather decided on a case-by-case basis according to the nature of the victims and their proportion to the total number of the group members. For example, if a considerable number of the leaders of a group are targeted, the impact might be strong even if the number of the victims may be low.[175] Thus, irrespective of the targeted number of victims, withholding of consent may constitute an offence of genocide if it is directed against a national, ethnical, racial or religious group, and is committed with the intention to destroy in whole or in part that particular group.[176]

4.3.2 Offences, in Particular Killing and Causing Serious Harm

Offences mentioned in Article 6 of the Rome Statute as possible acts of genocide, and which may be established by withholding of consent to relief actions, are "killing members of the group," "causing serious bodily or mental harm to members of the group" or "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."

As "killing" corresponds to what has been already said about murder under the definition of war crimes, only the latter two offences will be discussed in the following with regard to withholding of consent. "Causing serious bodily

173 Article 6 Rome Statute; OHCHR, p. 75.

174 Defined for example in ICTR, *Prosecutor v. Akayesu*, para. 512 and 513–515; referred in ROTTENSTEINER, p. 564.

175 On the overall topic, ROTTENSTEINER, p. 564; In respect to genocide, in contrast to war crimes and crimes against humanity, it is prohibited to incite others directly or to publically commit the crime according to Article 25(3)(e) of the Rome Statute. The incitement should not be confused with instruction or an superior order, but is rather an active influenc of another person's will to act. Thus, where a person for example calls for an impediment of relief actions with a genocidal intention, the person may be held responsible for genocide if it establishes an act of genocide as mentioned under Article 6 Rome Statute, see ROTTENSTEINER, p. 564. The practical relevance of this act is however questionable.

176 On the whole, ROTTENSTEINER, p. 564.

or mental harm to members of the group" includes a wide range of acts which may cause serious harm, without the injuries necessarily being permanent or irremediable. This definition would therefore also encompass withholding of consent and the wilful impediment of relief, if they are committed with genocidal intent.[177] On the other hand, with regard to the crime of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," the ICTR concluded that this includes methods of destruction in which the affected persons are not immediately killed, nonetheless their physical destruction is intended. According to the ICTR, this occurs for example when inflicting a subsistence diet on a group of people or by reducing their essential medical services below minimum requirements.[178] This view was confirmed by the ICC in its explanatory note to the Elements of Crimes of the Rome Statute, stating that the term "conditions of life" would also encompass "deliberate deprivation of resources indispensable for survival, such as food or medical services."[179] Thus, if a genocidal intention is given, the wilful impeding of relief may also fall within this offence.[180]

177 ROTTENSTEINER, p. 564.
178 ICTR, ICTR, *Prosecutor v. Akayesu*, para. 506; see ROTTENSTEINER, p. 565.
179 ICC, Elements of Crimes, Artictle 6(c), Element 4, fn. 4.
180 ROTTENSTEINER, p. 565.

PART 4

Legal Consequences of Arbitrary Withholding of Consent

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CHAPTER 14

Introduction

In order to be effective, a legal system requires that consequences are attached to violations of the norms.[1] Responsibility for violation of law and the possibility that it can be invoked are therefore essential elements for the respect and credibility of existing legal rules.[2] Accordingly, the UN Secretary General has indicated in his report on 'the rule of law and transitional justice in conflict and post-conflict societies' that, respect for the rule of law requires that

> all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[3]

In his Report on 'the protection of civilians in armed conflict' in 2015 it was particularly highlighted that there must be consequences for the parties withholding consent on arbitrary grounds. He further stated, that in order to ensure the respect of the law governing humanitarian assistance, it is crucial that there is accountability and enforcement when it is breached, anything less would promote a culture of impunity while violations flourish.[4] The obligations in relation to the provision of humanitarian assistance are in practice routinely violated by the conflict parties, often with little to no consequences. Despite this – or precisely for this reason – it is important to know, what legal regulations exist to hold the conflict parties in situations of arbitrary withholding of consent liable. Arbitrary withholding of consent raises two kinds

1 Bellal, Direct Responsibility, p. 304.

2 Fraquhar, p. 30.

3 UN Secretary General, Report on 'the rule of law and transitional justice in conflict and post-conflict societies', para. 6.

4 UN Secretary General, Report on 'the protection of civilians in armed conflict', para. 7; see Farquhar, p. 7.

of questions: first and foremost, what are the legal consequences for the concerned conflict parties for withholding consent arbitrarily. Secondly, corresponding to the previous question, what kinds of actions do exist for other actors involved in relief actions in order to respond to situations of arbitrary withholding of consent. This chapter outlines therefore as legal consequences not only the consequences for the affected State (Chapter 15) and non-State armed groups (Chapter 16) but also what kind of remedies can be taken in response to such situations by humanitarian actors (Chapter 17), non-belligerent States (Chapter 18) and civilians (Chapter 19).

CHAPTER 15

Accountability of the Affected State

If the affected State withholds consent arbitrarily through its officials, there may be legal consequences at the international level for the affected State itself as well as individual responsibility for the State officials involved in the process of withholding of consent.[1] A State can be held liable first and foremost based on the rules of State responsibility for violation of its international obligations (1).[2] In addition, human rights conventions provide particular grounds for holding a State responsible for violations of IHRL (2). In terms of individual responsibility, State actors involved in the arbitrary withholding of consent can be held responsible under international criminal law (3). In this respect, it is important to note that when an individual is found guilty under international criminal law, it does not exclude the State's responsibility for that particular act and vice versa.[3]

1 State Responsibility

As mentioned before, the rules on State responsibility are codified in the VCLT and the ILC Draft Articles on State responsibility. The application of the rules requires assessing if the arbitrary withholding of consent fulfil the constitutive elements of State responsibility (1.1) and if it falls within the scope of application of those rules (1.2), and if so, what the consequences are for the affected State (1.3).

1.1 *Constitutive Elements*

Article 2 ILC Draft Articles stipulates that State responsibility is triggered through two elements: first, there must be an action or omission of a person

1 GILLARD, p. 34.

2 That the application of the general rule of State responsibility exists in addition to the requirement to prosecute individuals for grave breaches, namely under international criminal law, is reflected in the four Geneva Conventions and also reaffirmed in the Second Protocol to the Hague Convention for the Protection of Cultural Property, GC I, Article 51; GC II, Article 52 ; GC III, Article 131; GC IV, Article 148, Second Protocol to the Hague Convention for the Protection of Cultural Property, Article 38, on the overall topic, see ICRC Study on Customary IHL, Rule 1.

3 See Article 25(4) Rome Statute; see OHCHR, p. 73.

or a group, which is attributable to the concerned State. Second, the conduct must breach international law to constitute a wrongful act.[4]

The requirement of attribution is in general difficult to determine during armed conflicts, as there may be diverse actors.[5] However, with regard to the withholding of consent to humanitarian relief, the actors are limited, as, like outlined before, negotiations for humanitarian relief are generally held with official organs of the affected State. Withholding of consent is decided and implied by persons acting in official functions, including the armed force of the State.[6] The actions of those organs are unequivocally attributable to the State.[7] A State is always responsible for acts committed by its official organs and other persons or entities which are empowered to act on its behalf, even if they exceed their authority or act contrary to instructions.[8] Thus, whether the decision to withhold consent to relief operation is instructed in consensus by the government is not required. It is attributable as long as the decision and implementation is performed by organs of the affected State.

According to Article 12 ILC Draft Articles, there is a breach of an international obligation when an act of the State "is not in conformity with what is required of it by that obligation, regardless of its origin or character." Arbitrary withholding of consent is in the first place a breach of the international obligation of the State not to withhold consent to relief operations on arbitrary grounds. Further, it may also (as indicated before) violate other international

4 Instead of many, see Kälin/Epiney/Caroni/Künzli, p. 214.

5 A State is primarily responsible for violations committed by its official organs, including its armed forces. But the responsibility of a State may also be invoked for violations committed by persons it empowered to exercise governmental authority, or groups acting in fact on its instructions, direction or control or when the State acknowledges acts of private persons or adopts them as its own conduct, for further remarks, see ICRC Study on Customary IHL, Rule 149; see also Article 4 – 11 of ILC Draft Articles on State Responsibility, see on the whole, Kälin/Epiney/Caroni/Künzli, p. 216 ff.; and Sassòli, p. 404 ff.

6 Especially applicable in the case of failed State, see Article 9 of ILC Draft Articles on State Responsibility: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority." Armed forces are a State organ, like any other entity of the executive, legislative or judicial branch of government, see ICRC Study on Customary IHL, Rule 139.

7 Their action is also attributable even if they act outside their competences. For action of organs of the State, it is not required to prove that they acted under the State's order. According to the ICJ "the conduct of any organ of a State must be regarded as an act of the State", ICRC Study on Customary IHL, Rule 149.

8 ILC Draft Articles on State Responsibility, Article 7, contained for armed forces of the State in AP I, Article 91, see on this the ICRC Study on Customary IHL, Rule 149.

obligations, such as duties under IHRL, the international principle of proportionality and necessity, or be in another way inappropriate in light of international standards. Either way, arbitrary withholding of consent may breach international obligations and standards and is therefore a wrongful act.[9] Arbitrary withholding is also not accessible for justification as codified under Articles 20 to 25 ILC Draft Articles, since they either do not fit to the situation of withholding of consent or are already considered in the assessment of the ground of withholding of consent as arbitrary.[10] Arbitrary withholding of consent is therefore an internationally wrongful act without the possibility of defence for the responsible State.

1.2 *Scope of Application*

The rules of State responsibility are applicable to all violations of obligations of international law to which the concerned State is bound (Article 3, 12 and 13 ILC Draft Articles), except "where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law" (Article 55 of the ILC Draft Articles). This reflects the maxim of *lex specialis derogat legi generali*.[11]

Accordingly, the application of the rules of State responsibility for violations of IHL is undisputed since IHL does not contain further provisions on the liability of States.[12] Article 91 AP I stipulates, though, for international armed conflicts that States shall be held accountable for violations of their obligations under international humanitarian law and be compelled to pay compensation.[13] However, this provision recalls only the general rules of State responsibility and does not provide any specific rules on determining the accountability of the concerned State.[14]

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9 AKANDE/GILLARD, Oxford Guidance, p. 48; GILLARD, p. 34.

10 ILC Draft Articles on State Responsibility, Articles 20–25 codify as possible justifying circumstances: consent, self-defence, countermeasure, force majeure, distress, necessity.

11 ILC Report, p. 140.

12 International tribunals also refer to the rules on State responsibility in order to attribute violations of IHL in non-international armed conflicts, for example the ICJ, *Nicaragua v. US*; p. 14, para. 115; see SASSÒLI, p. 403 f.

13 ICRC Study on Customary IHL, Rule 146. As a rule of customary humanitarian law, it is also applicable in non-international armed conflicts, Rule 150 ICRC Customary IHL Study 2005.

14 It applies only the general principle of the law of State responsibility, ICRC Study on Customary IHL, Rule 146; But also, many provisions in the GCs on the responsibility of States during international armed conflicts, for example Article 51 or 52 of the GC I, spell out in detail or modify only the general rules of State responsibility, see SASSÒLI, p. 404.

In contrast to IHL, it is it unclear whether the rules of State responsibility are also applicable to violations of IHRL as many human rights conventions have their own rules on determining liability of the concerned State.[15] According to some scholars, the general rules on State responsibility "should not be … considered appropriate" in the context of, for example, violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[16] The other response in the doctrine posits that international human rights law does not exclude the application of the rules on State responsibility.[17] In this respect, it should be recalled that the principle of the primacy of lex specialis requires not only that one provision regulats a subject matter in a more specific way than another one, but also that there is an actual or intended inconsistency between two provisions, so that they cannot coexist together.[18] Thus, not every specific rule on State's liability may exclude the law of State responsibility according to Article 55 ILC Draft Articles, but only if their content contradicts each other. As neither provisions on State liability in the regional nor the UN human rights conventions are known to have an exclusive and a contradicting character from the general regime of State responsibility, the present book support the view that those regulations may be applied alongside with the general rules on State responsibility.[19] It has also been demonstrated that in practice international human rights monitoring bodies apply the general rules of State responsibility to human rights cases, even though they do not expressly refer to them.[20]

1.3 *Consequences of State Responsibility*

1.3.1 Cessation and Reparation

State responsibility requires the liable State to cease the unlawful conduct, offer assurance not to repeat the conduct and make full reparations concerning the damage caused by the wrongful act (Article 30 and 31 ILC Draft Articles).[21] In case of withholding consent, the State in concern may cease and secure an end to the wrongful act by consenting, allowing, and facilitating the

15 CHIRWA, p. 11.
16 CLAPHAM, The "Drittwirkung" of the Convention, p. 170.
17 For example, CHIRWA, p. 11.
18 ILC Report, p. 140.
19 CHIRAWA, p. 9 f.
20 CHIRAWA, p. 7.
21 Article 30 ILC Draft Articles on State Responsibility, ILC Report, p. 88 and 90 ; Article 31 ILC Draft Articles on State Responsibility, ILC-Report, p. 9; Injuries caused by impeding humanitarian relief in armed conflicts will be rather moral damages such as individual pain and suffering of civilians, ILC-Report on moral damages, see p. 92.

provision of humanitarian relief. A non-repetition in future can be provided for example by verbal assurance or adopting specific measures assuring that the provision of relief will not be impeded. Reparation includes restitution, compensation and satisfaction. While restitution means "to re-establish the situation which existed before the wrongful act was committed,"[22] compensation refers to damage "insofar as such damage is not made good by restitution" and includes "any financially assessable damage,"[23] and satisfaction is finally "the remedy for those injuries, not financially assessable," which are "frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences"[24] and may include for example "an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality."[25] In situations of arbitrary withholding of consent to relief operations during armed conflicts, reparation may concern damages and injuries of the affected civilian population resulting from not receiving the required humanitarian relief.[26] However, in situations where the armed conflict is still going on, the concerned State will most probably – due its instable political situation – not be capable of providing restitution or compensation for damages and injures caused. Further, a symbolic act or apology from the concerned State will possibly not be a priority for the affected civilians in that situation. It is therefore to assume that in situations of arbitrary withholding of consent to relief operations during non-international armed conflicts, reparation may not be claimed in the first place, but rather cessation. This is also in general the case: even though reparation is one of the two main consequences for internationally wrongful acts and represent with their material and symbolic benefits the most direct and meaningful way of receiving justice, reparation is often in practice implemented last, while cessation is more frequently demanded from a wrongful acting State.[27]

1.3.2 Invocation

The flipside to the obligations of the concerned State which derive from its responsibility is that other States and international organisations have the right to invoke those obligations. States and international organisations may further also take countermeasures and apply sanctions.[28] The invocation and

22 Article 35 ILC Draft Articles on State Responsibility.
23 Article 36 ILC Draft Articles on State Responsibility.
24 ILC Report, p. 106.
25 Article 37 ILC Draft Articles on State Responsibility; see HEFFES/FRENKEL, p. 66.
26 See further Article 34 ff, ILC Draft Articles on State Responsibility, ILC Report, p. 95 ff.
27 ILC Report, p. 89 with further references.
28 ILC Report, p. 117.

the different means which can be taken with an invocation of State responsibility, in particular the application of countermeasures, will be discussed in detail later when dealing with possible measures that can be taken by non-belligerent States in situations of arbitrary withholding of consent.[29]

2 Responsibility for Violations of Human Rights Treaties

2.1 *In General*

Where withholding of consent leads to violations of human rights obligations which are enshrined in a IHRL treaty, the concerned State can also be held responsible by IHRL enforcement mechanisms if the State has agreed to such a procedure by accepting the relevant norm in the treaty or the respective additional protocol. Since there is no specific legal mechanism for enforcing IHL, the enforcement instruments of IHRL are also of particular importance for the enforcement of IHL.[30]

For assessing the State's liability for violations of provisions of IHRL treaties, the rules on State responsibility apply:[31] an action or omission attributable to the State must cause a breach of an obligation of the concerned State under the respective IHRL treaty.[32] As mentioned before, arbitrary withholding of consent is not accessible to grounds of justification. Therefore, any disregard of IHRL committed by arbitrary withholding of consent by the State leads consequently to a violation of the respective provision under that treaty. With regard to which concrete provision and which IHRL treaty may be violated in situations of arbitrary withholding of consent, reference can be made to the discussion before on the possible breaches of IHRL and the affected IHRL treaties in the context of withholding of consent.

2.2 *Individual Complaint Procedure and Monitoring Mechanisms*

The different instruments for enforcing a State's liability to violations of human rights will be discussed in detail in the context of the possible actions which can be taken by non-belligerents States and civilians. It is sufficient to mention here that most of the regional and international human rights conventions provide the possibility for individuals to enforce their human rights at the international level through complaints or communication to the treaty

29 See Chapter 18.

30 KÄLIN/KÜNZLI, p. 221 ff.

31 OHCHR, p. 73 with further references.

32 Instead of many, KÄLIN/KÜNZLI, p. 166 f.

body which is formed by a committee of experts or to a judicial body outside the treaty system.[33] Besides, international organisations and also NGOs have put in place various monitoring mechanisms to enhance and enforce IHRL.[34] The UN in particular has a number of monitoring procedures: the Human Rights Council is the main UN body charged with monitoring and evaluating conditions of human rights in the member States. There are also monitoring mechanisms laid down in the core human rights treaties where the treaty bodies review the implementation of the respective treaty based on periodical reports provided by the State. There are further Special Representatives, working groups and Special Rapporteurs with specified thematic monitoring mandates.[35] But NGOs like Human Rights Watch also make an important contribution to monitoring and reporting on IHRL violations. Even though the findings in the different procedure are not enforceable, States show nevertheless in practise the will to prove their compliance to their human rights obligations in view of their reputation towards the international community. They are therefore effective instruments to enforce compliance with international law by the concerned State.

3 Individual Responsibility under Criminal Law

Where withholding of consent to relief actions of the State can be qualified as a crime under international criminal law, individual responsibility of the respective State actors can be claimed. According to Article 25(3) of the Rome Statute a person shall be criminally responsible and liable for punishment if that person commit, orders, solicits, induces, facilitates or in any other way contributes to the commission or attempt of a crime under the Statute.[36] The person involved in any of those behaviours is held responsible, irrespective of his or her official capacity or hierarchical position.[37] The Rome Statute explicitly

33 KÄLIN/KÜNZLI, p. 221 ff.

34 BELLAL, Direct Responsibility, p. 308.

35 BELLAL, Direct Responsibility, p. 308; Kälin/Künzli, p. 221 ff.

36 Article 25(3)(a-d) Rome Statute. With regard to that attempt, it should be noted that "Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose", Article 25(3)(f) Rome Statute.

37 Art. 27, 28 and 33 Rome Statute.

establishes the responsibility of military commanders and other superiors for ordering the commission of a crime (Article 28 Rome Statute) as well as for persons for committing crimes by pursuing orders of the Government or a Superior (Article 33 Rome Statute).[38] Thus, in the case of withholding consent, not only those persons responsible for the decision to withhold consent to relief actions may be held liable, but also subordinates who carry out such orders and effectively impede the passage of relief actions.[39]

38 Article 33 Rome Statute: there are some grounds for excluding criminal responsibility in the case of war crimes, but there are no exceptions for genocide or crimes against humanity.

39 According to Article 28 and 33 Rome Statute.

CHAPTER 16

Accountability of Non-state Armed Groups

Even though it is generally accepted that armed groups shall be legally bound to similar international obligations as the affected State during armed conflicts, the consequences for non-State armed groups for breaches of those obligations are, however, limited.[1] Until today there are no regulations to hold non-State armed groups directly and as an entity responsible under international law (1). In particular, there is nothing like the rules of State responsibility for non-State armed groups which determine when an international obligation has to be considered as breached by non-State armed groups and what the consequences are. Also, individual complaint or communication procedures before human rights courts or treaty organs are limited to States.[2] Violation of international law by armed groups can be solely determined within international monitoring procedures, for example by UN organs or NGOs which can lead to certain sanctions for the armed group (2). Besides, there is the possibility to hold members of an armed group individually responsible for breaches under international criminal law (3).

1 No Direct Responsibility of the Armed Group

As mentioned before, a reference to non-State armed groups in relation to responsibility can be found in Article 10 of the ILC Draft-Articles on State Responsibility which states that the conduct of "a movement, insurrectional or other"[3] that establishes a new State "in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law."[4] Article 10 of ILC-Draft Articles does, however, not provide rules on responsibility of non-State armed groups, but only

1 Heffes/Frenkel, p. 42.

2 Heffes/Frenkel, p. 40.

3 As "movement, insurrectional or other," the commentaries to the ILC Draft Articles refer to the definition of non-State armed groups in AP II, Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission, 2001, Vol. II 2, 31, 51 Art. 10, para 9. With this refference, the commentary requires a high threshold for the application, since, in contrast to Common Article 3 of GCs, the AP II does not cover all non-international armed conflict, Heffes/Frenkel, p. 57.

4 See Chapter 7 2.1, 1.1.1 (1.1.1.3).

when a new State government can be held responsible according to the rules of State responsibility for the actions its members committed when they were part of a non-State armed group.[5] Practice shows further, that this rule has been applied only in certain arbitral decisions during the first half of the 20th century and has shown since then no relevance in dealing with responsibility of non-State armed groups.[6]

An approach of direct responsibility of non-State actors while they have not achieved any governmental status was made by the ILC in the provisional adoption of Article 14(3) of the ILC Draft Articles in 1996, saying that even though the conduct of an organ of an insurrectional movement should not be considered as an act of a State, it "is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law."[7] However, this Article was deemed to fall outside the scope of the subject of the State responsibility discussion, why it was subsequently deleted. The Special Rapporteur on the ILC Draft Articles noted nevertheless in his first report, that "the responsibility of such movements, for example for breaches of international humanitarian law, can certainly be envisaged."[8] Consequently, there are today no means to hold non-State armed groups responsible before a judicial forum. This is unsatisfying, which is why the possibility of direct responsibility of non-State armed groups will be discussed later as a required development of the law.[9] In situations where an armed group has attained an international legal personality, it is consequent, that the armed group itself can be held responsible for its own actions.[10] In this respect, it should be noted that during the drafting of the ILC Articles on State responsibility, there was also discomfort among the States at the suggestion that States could be responsible for the acts of non-State armed groups. It was often commented that armed groups

5 This position has been also affirmed by the ICRC in its Commentary to Common Article 3: "the responsibility of armed groups for violations of common article 3 can also be envisaged if the armed group becomes the new government of a State or the government of a new State. In these circumstances, the conduct of the armed group will be considered as an act of that State under international law," ICRC GC I, para. 890; in detail on this subject see HEFFES/FRENKEL, p. 58 f. with further references.

6 HEFFES/FRENKEL, p. 58 f.

7 ICRC, Study on Customary IHL, Rule 149.

8 Because of the exclusion of this subject from the Draft Articles, Article 10 states today only that the conduct of an insurrectional movement which becomes the new government of the State will be considered under international law as an act of that State; see on the whole ICRC, Study on Customary IHL, Rule 149.

9 Chapter 22 4.3.

10 FORTIN, p. 278.

shall bear also their own responsibility for their conducts.[11] A development of the law in this direction could therefore also be in the interest of the States.

2 Determination of Breaches within Monitoring Mechanisms

2.1 *Addressing Breaches of Non-state Armed Groups*

Where the aforementioned monitoring procedures of IHRL are applied in situations of non-international armed conflict they address not only the conducts of the government of the affected State inevitably but also the conducts of the involved non-State armed groups, even though it is not be explicitly included in the mandate.[12] Beside those mechanisms, there are also the monitoring procedures of Geneva Call which monitors exclusively the behaviour of armed groups in connection with the Deeds of Commitment which the armed group have signed.

The determination of violations in monitoring reports can constitute the basis for the application of sanctions by the international community against non-State armed groups such as travel bans, assets freeze or an arms embargo against the group.[13] The different sanctions which can be imposed in this context against non-State armed groups will be discussed in detail later under the possible reactions of non-belligerents States to arbitrary withholding of consent.

2.2 *Attribution of an Act to Armed Groups*

For claims of breaches of international law by a non-State armed group, it also has to be determined that an obligation has been breached by the armed group, in other words, the wrongful act has to be attributable to the armed group. There are however no general rules with constitutive elements defined for the attribution of a wrongful act to a non-State armed group.

BELLAL has in this respect analysed various reports of monitoring mechanisms in order to offer some insights on how monitoring mechanisms mostly addresse violations of international norms of non-State armed groups. Even though those reports did not talk expressly about attribution, there could be nevertheless identified means which were used by the reporting bodies to link a commission of a wrongful act by one or more persons to a particular

11 ILC, Yearbook of the International Law Commission 1974, 6 May -26 July 1974, Vol II, p. 98; hereto FORTIN, p. 277 with further references.

12 CLAPHAM, Rights and Responsibilities, p. 29.

13 BELLAL, Direct Responsibility, p. 316.

non-State armed group.[14] Bellal notes that a link has been made for example when the group claimed itself to have committed the act or when an identification of the group to which they belonged was possible on the basis of specific clothing or uniforms, interviews with witnesses or inspection of devices.[15] She, however, states that it is in general difficult to find in the reports a clear answer on how exactly the attribution process was made by the respective monitoring bodies. Bellal therefore suggests that more thought should be put by the drafters of such reports into how violations of international norms are linked to the non-State armed groups. She concludes that such information has to be provided in a more systematic and transparent way, if the international community wishes to ensure respect of international law by non-State armed groups.[16] Transparent rules on attribution are also required when there should be a direct responsibility of non-State armed groups before judicial bodies. Propositions on regulating attribution of wrongful acts to non-State groups will therefore be discussed later in the context of establishing direct responsibility of the armed group for wrongful acts.[17]

3 Individual Responsibility of the Members of the Armed Group

3.1 *Under International Criminal Law*

As the Rome Statute does not require that a person act in an official position, international criminal responsibility can be applied independently of the status of an individual, whether he or she performed as an organ of the State or a non-State actor.[18] However, due to political reasons, it is more frequent in practice that members of armed groups are held individually responsible before criminal courts than members of State forces.

Similar to State actors, the hierarchical level of a member of an armed group is not relevant for the responsibility under international criminal law. Thus, whether it is the commander who decides and orders the withholding of consent or a member such as a combatant who carries out the order

14 Bellal, Direct Responsibility, p. 308.

15 Bellal, Direct Responsibility, p. 310 ff.

16 Bellal, Direct Responsibility, p. 317.

17 See Chapter 22 4.3.

18 In contrast to the Convention against Torture, according to Article 1 of the Conventio against Torture, it is required that the "pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," on the whole, see Rottensteiner, p. 560 and Clapham, Rights and Responsibilities, p. 4.

and implements the decision, both may be held responsible under the Rome Statute. Commanders are further also accountable for war crimes committed by their subordinate without their command, if they knew or had reasons to know about those actions of their subordinate and failed to take the necessary and reasonable measure to prevent such an act.[19]

With regard to when arbitrary withholding of consent may constitute a crime, wecan refer to what has been already said about individual criminality. Finally, it should be noted that the crime against humanity requires according to the prevailing view in the doctrine, a substantial and certain level of organisation pursuant to or in furtherance of a concrete policy. Accordingly, to hold a non-State armed group member responsible under the crime against humanity, it has to be proven that he or she acted for a non-State group with a respective organisation level which is considered to be higher than the organisation level which is required for an armed group to be a party of a non-international armed conflict.[20] Armed groups may often not fulfil this higher organisational requirement, wherefore it is less likely that members of non-State armed group are held responsible under the crime against humanity.[21]

Finally, in order to hold a non-State armed actor individually responsible, it is similar to a State actor in that it is required that he or she knew about the international criminalisation of the act conducted and it has to be proven that the person acted with knowledge and intent of that crime. This proof is, however, particularly difficult to provide for non-State actors, as, unlike State forces, which normally have a basic training on relevant legal provisions and prohibitions under IHL and IHRL, members of non-State armed groups, who are often drawn from the civilian population, normally do not possess a particular knowledge of international crimes.[22] For the proof of liability of a member of an armed group it is therefore required that the exposure of that individual to relevant information of existing crimes and the obvious nature of the criminality of the committed action is taken in account.[23] With regard to

19 CLAPHAM, Rights and Responsibilities, p. 35; In this respect, the Special Court for Sierra Leona recalled, with regard to the less developed structure in armed groups, that the power to issue order is crucial for a person to be considered a superior within an armed group who holds the exercise of effective control. Thus, it is more important to focus on the nature of the superior's authority rather than his or her formal designation, CLAPHAM, Rights and Responsibilities, p. 10.

20 BARTELS, p. 304.

21 BARTELS, p. 304.

22 RODENHÄUSER, p. 16.

23 On the overall topic, see CLAPHAM, Rights and Responsibilities p. 11 with further references.

withholding of consent, which is not explicitly mentioned as an international crime in an international convention or regulation, such a proof would be even more difficult. An explicit reference to withholding consent as a criminal offence could serve as a remedy here, and will be discussed later as a necessary legal development.

3.2 *Judicial System of Armed Groups*

Armed groups which have absolute control over a specific territory and perform government-like functions sometimes set up their own judicial infrastructure based on their social or religious structure in situations of armed conflict. The courts are of ad-hoc nature and the judges are, for example, imams or former judges of the State institution. Such courts also hold own members of the armed group responsible based on their own understanding of their legal obligations.[24] There are few examples of armed groups which have held trials to punish their own members.[25] However, besides the fact that there is an ongoing discussion as to if and under what circumstances non-State- armed groups may lawfully convict individuals,[26] it seems to be unlikely that withholding of consent would be considered by the armed group under its legal system as a crime, since, as discussed before, the choice to withhold relief action isoften made at a higher hierarchical level, representing a decision by the armed group as such, and is therefore carried out with the permission of that group.

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24 For example, in Syria, see hereto Rodenhäuser, p. 13.

25 Somer, p. 681; La Rosa/Wuerzner p. 338.

26 See on this Rodenhäuser, p. 13 ff.

CHAPTER 17

Remedies for Humanitarian Actors

Humanitarian actors who are prevented from providing relief don't have to remain inactive in situations of arbitrary withholding of consent. A question which has been discussed prevalently in the last few years in the context of arbitrary withholding of consent was whether humanitarian actors may provide relief even without the consent of the concerned conflict party (1).[1] Besides, humanitarian organisations can also get involved in bilateral dialogues with the conflict parties or make a public pronouncement on the committed violations of the law in order to move the parties to consent to relief actions (2).

1 Possibility of Providing Relief without Consent

1.1 *Breach of International Law*

Even though arbitrary withholding of consent to humanitarian relief constitute a violation of international law, it does not entitle humanitarian actors for conducting relief operations without consent of the respective conflict parties.[2] Actors seeking to provide relief must comply with the rules of international law, if they want to benefit from the rights and safeguards to which they are entitled – regardless of whether the conflict parties respect international law or not.

Provision of relief without consent does not mean that humanitarian actors and their personal or equipment lose their status and their protection as civilians respectively as civilian objects. But particular protection of humanitarian actors and duties of the conflict parties such as the duty to allow and facilitate rapid and unimpeded passage of relief supplies, equipment and personal only arises if the relief operations have been consented to.[3] Thus, even in situations of withholding of consent, humanitarian actors have to pursue to obtain the consent of concerned conflict parties. As outlined before, all humanitarian actors have the duty to respect the requirement of consent based on the IHL. For States and international organisations this duty further arises also from the

1 Van den Herik/Jägers/Werner, CAVV Advisory Report, p. 21.
2 Akande/Gillard, Oxford Guidance, p. 51.
3 Akande/Gillard, Oxford Guidance, p. 51.

principle of State sovereignty and territorial integrity.[4] Consequently, provision of relief without consent constitute a breach of IHL and of the principles of international law.[5] Doctrine has, however, identified three situations where relief actions without consent may exceptionally be justified:[6] first, when such relief actions are imposed by the UN Security Council through a binding

4 Some authors argue that the requirement of consent only result from public international law. Since public international law applies only to States and international organisations and not private actors, they conclude that NGOs wishing to provide non-consensual humanitarian assistance are not prohibited by international law, while for States and international organisations it will be regarded as an unlawful intervention unless the wrongfulness can be excluded on the grounds of necessity, see for RYNGAERT, Countermeasures, EJIL Talk Blog. According to the present book however the wrongfulness is given for all humanitarian actors based on IHL.

5 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 21 f.; There are voices in the doctrine that claim that the provision of humanitarian aid as such cannot constitute a violation of State sovereignty. This view was notably captured in the letter signed by international experts in 2014 and again in 2023 in response to the Syrian government's refusal to allow sufficient aid deliveries from Damascus to opposition-held areas (see https://www.crossborderislegal.org/). Their argument stresses that the United Nations does not need a Security Council resolution, as there is no legal obstacle to the delivery of aid across the border into Syria. The author of this book agrees with this statement insofar as the provision of humanitarian aid cannot be interpreted as an act of aggression. However, it is doubtful that the sovereignty of the State will not be affected in any way by the provision of humanitarian relief. Such an interpretation, which is understandably put forward in favour of the affected population, would however open up the possibility of a humanitarian organisation being able to enter the territory of a State at any time in order to provide humanitarian relief. This would mean that the State would no longer have any control over who enters its territory, even if it does not want to invoke unlawful grounds for refusal, but only has a legitimate interest in coordinating external humanitarian assistance, which may be precisely for the benefit of the affected population. An uncontrolled influx of humanitarian aid may run counter to the principle of "do no harm." Having control over the territory of the State is an essential element of State sovereignty and integrity. An interpretation that humanitarian assistance can be provided at any time would therefore be contrary to the spirit and purpose of the idea of State sovereignty. In the author's view, the right to enter the territory of a State without its consent should only be considered in exceptional cases, e.g. in situations where humanitarian aid is arbitrarily withheld. In these situations, legitimate reasons could then justify the act, which is in principle contrary to the international law. Such an interpretation would also protect the affected population while respecting the essence and meaning of State sovereignty.

6 However, it is to note, whether an international organisation may conduct operations without consent may also depend on the rules of the respective organisation and its constituent instrument. Thus even in cases where the wrongfulness of an act can be precluded according to general rules, there may be a particular rule binding on the organisations in question, which is why they cannot invoke such an exemption to unlawfulness in casese where wrongfulness could be excluded. In the scope of the present book such individual possibilities cannot be discussed in detail, see on this AKANDE/GILLARD, Oxford Guidance, p. 52.

resolution based on Chapter VIIof the Charter, second, when the principle of necessity can be invoked, and third, when relief actions are applied as countermeasure against the affected State.[7] Since in the first case the decision to act without consent is made by the UN Security Council as an Organ of the UN and not by the humanitarian actors (even though the provision is followed later by humanitarian actors), this measure will be explained later under the possible actions by non-belligerent States.[8] Thus, in the following only the possibility to provide humanitarian relief as an action which can be taken by humanitarian actors based on the principle of necessity (1.3) or by referring to the right to countermeasures (1.4) will be discussed. Even though the present book does not analyse the legal consequences for humanitarian actors in situations where non-consented relief actions cannot be justified, it is nevertheless required for the following discussion on justification to understand the normative basis of the responsibility of humanitarian actors. Before taking a closer look on the grounds of justification for relief without consent, a brief discourse is therefore made on the responsibility of humanitarian organisations (1.2).

As a concluding remark it is important to mention, that even though there may be theoretical arguments that in exceptional cases relief could be provided without consent in situations of arbitrary withholding of consent, this may in practice not be sufficient to alleviate the concerns of the humanitarian actors, since providing relief without consent constitute prima facie an illegal act. It will therefore be discussed later how the following legal arguments can be strengthened so that the ground of justification can be effectively applied.

1.2 *Responsibility of Humanitarian Organisations*

There is no common internationally agreed upon legal basis for the responsibility of humanitarian actors. Instead, the ground for holding a humanitarian actor responsible depends on the legal status of the respective actor: third States and international humanitarian organisations are subject to the international law and as such their responsibility is governed by the rules of international responsibility, which are codified in the ILC Draft Articles on State Responsibility as well as in the ILC Draft Articles on Responsibility of International Organisations. NGOs on the other hand, are not addressed by the international law. Humanitarian NGOs can be held as private actors responsible under the national law of the country in which they act. Besides, it is unclear in the doctrine whether they further may have also a legal responsibility at

7 Van den Herik/Jägers/Werner, CAVV Advisory Report, p. 21 f.

8 Akande/Gillard, Oxford Guidance, p. 52.

international level.[9] The Special Rapporteur on Responsibility of International Organisation explained in its first Report to the Draft Articles that NGOs are not included in the ILC study since they do not exercise governmental functions.[10] However, in situations of armed conflict, humanitarian NGOs take over the governmental function of the affected State by providing the required relief to the civilians in need. They perform relief actions akin to international humanitarian organisations or third States and are also bound in the same way to IHL and international humanitarian principles. It seems therefore justifiable that they are also held responsible at international level like them.[11] An in-depth analysis of this justification would go beyond the scope of the present book. But considering the increasing number of NGOs acting in the environment of armed conflict, this statement definitely requires a closer look in the doctrine in the future.

1.3 *Justification based on the Principle of Necessity*

The principle of necessity is mentioned in the ILC Draft Articles on State Responsibility and the Responsibility of International Organisations "as a ground for precluding the wrongfulness of an act which is not in conformity with an international obligation."[12] Since the doctrine of necessity also includes the ability of private persons to justify a violation of law, the principle may also be referred by NGOs as a ground of justification. Constitutive elements of the principle of necessity are that the action in question has to safeguard an essential interest against a grave and imminent peril (1.1), it should not seriously impair an essential interest of the affected party (1.2) and it has to be only way available for preserving the respective essential interest (1.3).[13] As it will be outlined later, the threshold to meet these requirements is relatively high so that provision of relief without consent may only be justifiable in very limited situations under the doctrine of necessity.

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9 BARRAT, p. 230 f.; CHARNOVITZ, p. 338.

10 The Special Rapporteur explained that NGOs were not included in the study because "they do not generally execise governmental functions and moreover would not raise the key question of the responsibility of member States for the conduct of the organisation," Frist Report on Responsibility of International Organisations, UN Doc. A/CN.4/532, 26 March 2003, p. 12, para. 21.

11 Forarguments on holding NGOs responsible at the international level, see BARRAT, p. 231 f.

12 Articles 25 of the ILC Draft-Aricles on State Responsibility and ILC Articles on the Responsibility of International Organisations.

13 AKANDE/GILLARD, Oxford Guidance, p. 52, on elements of necessity, see also Article 25 of the ILC Articles on the Responsibility of International Organizations.

1.3.1 Safeguard an Essential Interest

What may represent an essential interest has to be judged in the relevant case under consideration of the given circumstances. The wrongfully acting party is here not by itself competent to decide what constitutes an essential interest. In order to be of particular interest, there must also be a general consensus within the international community that the relevant interest is sufficiently important.[14] Such interests do not necessarily have to be legally relevant aspects. The ILC mentioned in its commentary to State responsibility that also political or economic survival, internal peace of a State or the existence of part of its population are essential interests under the doctrine of necessity.[15] Further, it does not have to be necessarily the sole interest of the actor undertaking the wrongful act, but may also embody the concern of the international community as a whole.[16] And whatever the interest may be, it has to be threatened by a grave and imminent peril that the condition of necessity is satisfied. Therefore, the peril has to be objectively established in addition to being grave and imminent.[17] Protecting the civilian population from imminent and sever suffering and preventing breaches of their human rights can therefore be considered as a sufficient essential interest of the international community to be safeguarded by relief operations without consent.[18]

1.3.2 No Serious Impairing with Essential Interest of the Affected Party

Relief operations conducted without consent may impair essential interests, such as the territorial integrity of the conflict parties.[19] What has been said before on the requirement for an essential interest can also be applied here: the impaired interest has to be determined from the view of the affected actor and does not have to represent also an interest which has to be legally respected by the one who is committing the wrongful act. An impairment with territorial integrity can therefore also be given when an NGO is providing relief without consent. Further, the interest in concern does not have to be necessarily a legally acknowledged right of the affected party if it can be objectively agreed on its importance for that party. On this basis, it can also be argued that the provision of relief without consent could interfere not only with the

14 AGIUS/CAMERON, p. 20.
15 ILC Report, para. 71; on the whole AGIUS/CAMERON p. 19.
16 AKANDE/GILLARD, Oxford Guidance, p. 52; ILC Commentary to Article 25 of the ILC Articles on State Responsibility, p. 80–84.
17 ILC Commentary to Article 24 of the ILC Draft Articles on State Responsibility, p. 83.
18 Similarly, AKANDE/GILLARD, Oxford Guidance, section 147.
19 AKANDE/GILLARD, Oxford Guidance, section 148.

territorial sovereignty of the concerned State, but also with the interest of non-State armed groups in territorial control or its otherwise existing impact on the territory, which represents also important and essential (territorial) interests of these groups.[20] However, the principle of necessity only precludes a serious impairment of an essential interest. In this light, the conclusion of the Oxford Guidance can be followed that where the conduct of humanitarian relief operations is relatively brief, like for example through air drops of humanitarian relief supplies, it seems not to impair any territorial interest to a serious degree. But where the operations would contribute to an inability of the concerned party to exercise control of a territory, which is for example the case where humanitarian camps or corridors are built non-consensually, it may constitute a serious impairment of that party's essential interests and may therefore not be justifiable under the principle of necessity.[21]

1.3.3 Only Way of Preserving the Essential Interest

Finally, in order to invoke justification under necessity it is required that the wrongful act must be the only way of preserving the essential interest. There should not be other, lawful means available for doing so, even if they may be costlier or requires more effort. In that sense, it has to be noted that any conduct which is going beyond what is strictly necessary with regard to the initial purpose will not be covered by the principle of necessity.[22]

In a situation of humanitarian emergency, alternatives to a provision of relief without consent may be offering assistance through actors whose operations the relevant conflict party has consented to.[23] As mentioned before, the provision of relief has to be conducted whenever possible with the consent of the affected party. Therefore, further discussion and also cooperative actions with other States or international organisations has to be considered before humanitarian actors may decide a unilateral relief action.[24] In view of this, necessity can be invoked only in extreme situations where a humanitarian relief operation has to exceptionally provide relief without consent because

20 ILC Commentary, p. 80–84. It is to note, that only the act of providing relief requires to be an internationally wrongful act, not the impairment with essential interests of the affected party.

21 AKANDE/GILLARD, Oxford Guidance, with regard to the impairment to the States interest on territorial integrity, p. 52.

22 ILC Commentary to Article 24 of the ILC Draft Articles on State Responsibility, p. 83, para. 15.

23 AKANDE/GILLARD, Oxford Guidance, p. 53.

24 ILC Commentary to Article 24 of the ILC Draft Articles on State Responsibility, p. 83.

no other alternatives exist at all or if they would not meet the needs of the affected population effectively or in a timely manner.[25]

1.4 *Justified as a Countermeasure*

Since countermeasures are acts of reprisal which are in themselves wrongful, but which can be justified if they are taken in response to a previous wrongful act,[26] the Oxford Guidance suggests that the wrongfulness of humanitarian relief actions without consent can also be precluded by arguing that the provision constitutes a countermeasure in response to the arbitrary withholding of consent.[27]

It must be noted here, that as an institution of international law, countermeasures are only available to subjects of international law such as third States or international organisations and can be taken only in response to a wrongful act committed by a State. The provision of relief without consent can therefore be applied as a countermeasure only by third States or international humanitarian organisations and it can be taken in response to an arbitrary withholding of consent of the concerned State. Countermeasures cannot be taken against non-State actors nor are they available to NGOs as a basis of justification. Those actors are excluded from the application of countermeasures.[28]

In order that the provision of relief without consent by third States or international humanitarian organisations can be considered as a countermeasure, it has to meet certain conditions: First and foremost, the actors conducting the relief action have to be entitled to take countermeasures in response to the wrongful act, namely the arbitrary withholding of consent of the concerned State (2.1). Second, the purpose of the countermeasures must be to induce the concerned State to comply with its obligations, which include the obligation to cease its violation of international law, and – where appropriate – provide reparations and offered guarantees of non-repetition (2.2). Third, the provision of relief of consent must be proportionate to the injury suffered (2.3).[29]

25 Similar arguments by Akande/Gillard, Oxford Guidance, p. 53.

26 Instead of many, see Kälin/Epiney/Caroni/Künzli, p. .296.

27 Akande/Gillard, Oxford Guidance, section 152.

28 At least according to today's prevailing doctrinal opinion, there is no possibility of countermeasures against non-State actors. There are however also other considerations in the doctrine. See on this for example the arguments in Richemond-Barak, p. 144 f.

29 See on the whole, Akande/Gillard, Oxford Guidance, p. 54 referring to Articles 22 and 49–54 of the ILC Articles on State Responsibility.

1.4.1 Entitlement to Take Countermeasure

The requirements for being entitled to take countermeasures will be discussed in detail later in the context of the invocation of State responsibility by non-belligerent States. Reference can therefore be made to the discussion there. It is important to note here that countermeasures are normally taken by international actors when they are directly injured by the initial wrongful act of the State concerned. The problem here, however, is that the arbitrary withholding of consent to relief operations in non-international armed conflicts primarily affects the civilian population that has not been provided with relief. It is therefore questionable whether States and international humanitarian organisations are nevertheless entitled to take countermeasures.[30] It will be shown later that the provision of humanitarian assistance is an *erga omnes* obligation, the fulfilment of which is in the interest of the international community as a whole. On this basis, arbitrary withholding of consent entitles States and international organisations to take countermeasures in the interest of the affected civilian population.[31] It will also be discussed whether neighbouring States can be qualified as injured States and take countermeasures if they are particularly affected by the humanitarian crisis and refugee movements that arbitrary withholding of consent may cause.[32]

1.4.2 Purpose of Countermeasure

Countermeasures are taken to induce the wrongfully acting party to comply with its obligation. But by providing relief for the civilian population in need, the humanitarian actors actually perform the duty which is not carried out by the violating party and create single-handedly compliance rather than inducing it.[33] For that reason, it is questioned in the doctrine whether humanitarian relief operations which are conducted without consent of the concerned State meet the required purpose of a countermeasure.[34]

Normally, the object of a countermeasure differs from the object of the obligation owed primarily by the concerned State. But in case where humanitarian relief operations are provided without consent of the concerned State,

30 Ryngaert, Countermeasures, EJIL Talk Blog.

31 Ryngaert, Countermeasures, EJIL Talk Blog; Akande/Gillard, Oxford Guidance, section 154 referring on text and commentary to Article 54 of the ILC Draft Articles on State Responsibility, supra, 137–139.

32 See for the whole, Chapter 18 1.2.

33 Ryngaert, Countermeasures, EJIL Talk Blog.

34 Akande/Gillard, Oxford Guidance, section 155; Ryngaert, Countermeasures, EJIL Talk Blog.

both actions coincide. However, as RYNGAERT points it out correctly, the law on countermeasure does not exclude such an overlap of the object of a countermeasure and the object of the obligation owed.[35] Important is, as it is further stated in the Oxford Guidance, that the measure is "taken with a view to procuring the cession of and reparation for the internationally wrongful act."[36] Thus, as long as the purpose of the acts is to induce the wrongful party to cease the unlawful impeding of humanitarian operation and if the operations undertaken without consent are intended to be temporary and to stop once the illegality ceases, the purpose of a countermeasure will be met.[37] Thus the humanitarian actors only conduct the relief operation until the concerned State consents to it. From that point on, the same operation can be continued but on a different legal basis. As RYNGAERT call it, from that point on there is "norm compliance rather than countermeasure."[38]

1.4.3 Proportionality

Even though countermeasures are conducted in response to a wrongful act, they have to meet the condition of proportionality, which is also explicitly mentioned in Article 51 of the ILC Draft Articles on State Responsibility. This requires that the gravity of the wrongful act including the quantity and seriousness of the injury suffered and the importance of the rights infringed by the wrongful act on the one hand and infringement which is conducted by the act of the countermeasure on the other hand must be weighed against each other.[39] As mentioned before to the principle of necessity, the concerned States party's right on its territorial integrity constitute an essential interest. The provision of relief without consent on the basis of countermeasures can therefore – similar to the principle of necessity – only be justified in limited and extreme cases, where the unlawful impediment of humanitarian relief operations amounts to a serious breach and leads to severe consequences for the civilian population in need.[40] And also countermeasures

35 RYNGAERT, Countermeasures, EJIL Talk Blog.

36 AKANDE/GILLARD Oxford Guidance, p. 54 referring on ILC Articles on State Responsibility, supra, introductory commentary to Part 3; Chapter 2 (Countermeasures), para 6.

37 AKANDE/GILLARD, Oxford Guidance, p. 54.

38 RYNGAERT, Countermeasures, EJIL Talk Blog.

39 AKANDE/GILLARD, Oxford Guidance, p. 54. referring on Commentary to Article 51 of ILC Draft Articles on State Responsibility.

40 AKANDE/GILLARD, Oxford Guidance, p. 55, RYNGAERT, Countermeasures, EJIL Talk Blog.

may not in any circumstances breach the prohibition of threat or use of force.[41]

Thus, even if third States and international humanitarian organisations may be entitled to take countermeasures, the principle of proportionality reminds that such measures will be only accepted if they are particularly serious.[42] This lead to the conclusion, that the bar for providing relief operations without consent on the basis of the principle of necessity as well as on the law of countermeasures are put very high so that the opposing interest of the conflict parties can not be too easily precluded and require a reasonable compromise.[43] For a legally justified provision of relief without consent, it has therefore to be determined for each situation of arbitrary withholding of consent if the wrongfulness of such a provision and the breach of the interests of the conflict party can be precluded in view of the suffering of the affected civilian population. While provision of unconsented relief under the principle of necessity requires no serious impairment with the interest of the conflict parties and allow only brief conducts for example by air drop, the provision of relief as a countermeasure may even legalise a situation where the humanitarian actors enter for a longer period and exercise control over a territory of the conflict party with regard to the provision of relief.

The provision of relief without consent constitutes a significant breach of the territorial integrity and interest of the conflict parties. Even if such action may be in line with the legal requirements, practice however shows that no relief action has been ever put in place in practice without any cooperation with the concerned conflict party. It will be outlined later, that for political and security reasons, the conflict parties are nevertheless involved when it comes to the conduct of relief actions on their territory. Thus, a provision of relief without consent is so far understood as a possibility to ignore the consent for the decision that relief shall be provided, but not as a full ignorance of the concerned conflict parties when it comes to the actual implementation.

41 Akande/Gillard, Oxford Guidance, p. 55 referring on Article 50 of the ILC Articles on State Responsibility, supra.

42 Ryngaert even state that such a reading may indicate that in practice only breaches of *jus cogens* can be accepted for a non-consented provision of relief, see Ryngaert, Countermeasures, EJIL Talk Blog.

43 With regard to countermeasurs, Ryngaert, Countermeasures, EJIL Talk Blog.

2 Bilateral Dialogues and Public Pronouncement

The approach on bilateral dialogues and public pronouncement is different depending on the respective humanitarian organisation. While the ICRC seeks rather the path of confidential dialogues with conflict parties than public pronouncement in situations where it determines violations of international law, NGOs are more likely to make public pronunciations. Third States and international humanitarian organisations, on the other hand, have as international actors beside bilateral dialogues and public pronunciations also other means to react in situations of violations of law. Approaches of third States and international humanitarian organisations are included in the mention later of possible reactions which can be taken by all non-belligerent States in situations of arbitrary withholding of consent. The following section will therefore discuss only the demarche of the ICRC (2.1) and the approach of NGOs (2.2) on bilateral dialogues and public pronunciations.

2.1 *Demarche of the ICRC*

In order to act in an effective and consistent manner, the ICRC has adopted and published in 1981 a guideline on its actions in the event of violations of IHL. In response to current developments, including the increasing diversity of situations of violence, ICRC reviewed the guideline in 2005 and newly titled it as 'Actions by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence'. With that the guideline emphasises that it is also applicable – *mutatis mutandis* – to internal disturbances or other situations of violence which do not yet constitute an armed conflict and where IHL is not applied, but there may be still other fundamental regulations with regard to the affected civilians for whose protection the ICRC may take actions.[44] Accordingly, the guideline defines at first as a general rule that "[t]he ICRC takes all appropriate steps to put an end to violations of international humanitarian law or of other fundamental rules protecting the persons in situations of violence."[45] The action has to be taken as soon as the ICRC is aware of a violation. The kind of action it takes depends on the nature and gravity of the particular situation. The guideline however distinguishes between principal (2.1.1) and subsidiary modes of action (2.1.2).[46]

44 Action by the ICRC, p. 393 f.
45 Action by the ICRC, p. 394.
46 Action by the ICRC, p. 394.

2.1.1 Principal Mode of Action: Confidential Representation

Since the ICRC follows an understanding of neutrality which includes particularly confidentiality as a working method, it does not chose in situations of violations the path of public condemnation and method of 'naming and shaming', but rather endeavours to effect compliance with law by the conflict parties 'behind the scenes'.[47] The guidelines confirms therefore that the ICRC's principal and preferred mode of action in response to a violation of law is to carry out bilateral and confidential representation to the conflict parties. The ICRC thus confidentially approaches the authorities of the party or parties responsible for the violation and tries to convince them in a bilateral dialogue to change their behaviour and uphold their obligations.[48] Due to its internationally acknowledged mandate, political independence and confidential working method, the ICRC is also often accepted by States and non-State armed groups as a dialogue partner. The ICRC points out in its document to the guideline, that the primary effect of a bilateral dialogue is to reinforce awareness of the existing problems and urge the concerned parties to take responsibility and act accordingly. It further confirms that years of experience have shown that confidential dialogues would enable open talks with the authorities since there is an atmosphere of trust and no risk of politicisation through public debates.[49]

However, as already mentioned before, the ICRC's confidentiality is not absolute and unconditional. ICRC demands from the concerned authorities in return that they take account of its recommendations on ending the violations noted. Thus, the maintenance of the ICRC's confidentiality depends on the quality of its dialogue with the conflict party and whether it leads to positive impacts. Where the confidential dialogues fail and the ICRC is unable to improve the humanitarian situation through a confidential approach, it has reserved the right to turn into subsidiary modes of action. The ICRC may take such measures also without any confidential approach before, in cases where talks with the authorities concerned are completely inaccessible.[50]

2.1.2 Subsidiary Modes: Mobilisation, Public Declaration and Condemnation

The ICRC mention in its guidelines as actions of subsidiary modes through which it may gradually move away from its principle of confidentiality, the

47 Sivakumaran, Non-International Armed Conflict, p. 471.
48 Action by the ICRC, p. 395.
49 Action by the ICRC, p. 395.
50 Action by the ICRC, p. 395.

humanitarian mobilisation, public declaration and as last resort, public condemnation.[51]

With humanitarian mobilisation the ICRC keeps up to confidentiality insofar as it does not make information on violations public to the international community, but shares discreetly its concerns about violations with a third party such as a government of another country, an international or regional organisation or non-State entity or an individual, if it considers that this third party is in a position to support the ICRC's representation and positively influence the behaviour of the concerned conflict party. This is particularly the case when the third party has a close relationship with or enjoys particular respect from the party to the conflict. The humanitarian mobilisation is therefore directed primarily towards other States, since they play as international actors a key role in international relations and may have a significant influence on the conflict party responsible for violations. States have an obligation to do so according to Common Article 1 of the GCs and AP I, which requires that States have "to respect and ensure respect" for IHL in all circumstances and will be discussed in detail later. It is however important to note here, that any third party that is approached in that way by the ICRC has to respect also the confidential nature of ICRC's representation and the information it receives. The ICRC will therefore seek the support of a third party only when it has a strong belief in that the approached third party will respect its confidentiality and has the ability to exercise a positive influence on the authorities concerned.[52]

With a public declaration, the ICRC may publicly express its concern about the quality of its bilateral confidential dialogue with a conflict party or particularly about the response given to its recommendations regarding a specific humanitarian problem. Even though the declaration is public, it concerns only the problems which the ICRC faces in the bilateral dialogue, the content of the dialogue or the recommendations remain confidential. The problems will therefore be mentioned in general terms and won't include any detail of the difficulties nor a legal assessment of the situation by the ICRC. The aim of a public declaration is that this will prompt the concerned conflict party to improve the dialogue and take account of the recommendations. It shall further ensure that the silence of the ICRC is not interpreted as a sign that the concrete situation is acceptable and satisfactory.[53]

51 Action by the ICRC, p. 395 f.

52 The obligation of non-belligerent States to conduct bilateral dialogues with the concerned conflict party on the basis of Common Article 1, including situations of request of the ICRC, will be discussed in detail later, on the whole see Action by the ICRC, p. 396.

53 Action by the ICRC, p. 397.

Where the confidential procedure and, if attempted, the humanitarian mobilisation of third parties fail and the violations committed are 'major and repeated or likely to be repeated', the ICRC moves to the last resort of public condemnation. By publicly condemning the ICRC make a public statement to the international community that acts which can be attributed to a conflict party constitute a violation of international humanitarian law and appeal with this to the concerned conflict party to respect their duties. Since this measure is a complete abandonment of its principle of confidentiality, it is only taken exceptionally, when it has exhausted every other reasonable means and if such publicity seems to serve the interest of the affected people or population as a whole and if the ICRC is convinced that public pressure is the only means of improving the situation in humanitarian terms.[54] The ICRC made public statements for example on the situation in Kosovo in 1998. In 2014, the ICRC reported in the context of the conflict in the Occupied Palestinian Territories and Israel, regularly on the breaches of international law which it had observed.[55] With regard to the humanitarian crisis in Syria the ICRC repeatedly called on restraints and humanitarian access to the civilians in need, but also made public statements, that IHL is constantly violated by the conflict parties from all sides.

ICRCs defined particular demarche in situations of violation of IHL and IHRL is a complement to the other possible forms and mechanisms of enforcement and is also recognized and respected by the international community.[56] It is undoubted that the ICRCs demarche is also a strong tool in the context of the arbitrary withholding of consent since the goal of those measures are a fast end of the violation without any formal acts or long judicial processes. And particularly the aspect of confidentiality enables the concerned parties to reconsider their withholding without having a public debate whether there is a reasonable ground or not and being in need of justification which may cost further unnecessary delay.

2.2 *Approaches of NGOs*

Humanitarian NGOs can also be engaged in the enforcement of humanitarian law in situations where they experience a breach of law.[57] Humanitarian

54 Action by the ICRC, p. 397; hereto also HEINSCH, p. 89.

55 SCHENKENBERGER VAN MIEROP, p. 302.

56 SIVAKUMARAN, Non-International Armed Conflict, p. 472.

57 In recent years, also human rights NGO have taken the view, that enforcement of law during armed conflicts fall in their purview, see on this SIVAKUMARAN, Non-International Armed Conflict, p. 472 f.

NGOs have the possibility to either report violations they witnessed during their work to the ICRC or UN agencies as those organisations have politically more influence and they can protest directly to the relevant party to the conflict that the violations must cease. Nonetheless, as mentioned before, the public denunciation of crimes by humanitarian organisations gives rise to several operational dilemmas.

While States and international humanitarian actors find themselves in a dilemma between the need of engaging with non-State armed groups and the political impact of the engagement as formal dialogue might give the impression of recognition and legitimacy of the armed group. But also, the non-State actors may fear that formal dialogue with State or international actors make them vulnerable to surveillance and intelligence gathering.[58] In this constellation, NGOs have more freedom to engage with and be accepted by armed groups and also to implement monitoring processes. Through their political independence they are however freer to state their opinion.[59]

Non-governmental humanitarian organisations may also seek a bilateral approach. But here since the variety of possible actors are enormous, it depends on how established and renowned the particular organisation is for the willingness of the conflict parties to have dialogue with them. States are further less likely to get engaged in dialogues with non-State actors. NGOs apply therefore often the approach of 'naming and shaming' in situations of violation of IHL as a means to enforce the law.[60] MSF consider the documentation and public pronouncement of humanitarian law violations even as an integral part of any responsible relief actor. The 'naming and shaming' approach is considered as a powerful enforcement mechanism which complement particularly the approach of the ICRC since the conflict parties have also an interest to be acknowledged by the international community as lawful actors.[61] The former UN Secretary-General Kofi Annan explained in this regard:

> [i]n today's world, parties to conflict cannot operate as islands unto themselves. The viability and success of their political and military projects depend on networks of cooperation and good will that link them to the outside world, to their immediate neighbourhood as well as to the wider international community. There are, consequently, powerful factors that can influence all parties to the conflict: The force of international and

58 HOFMANN, p. 397.
59 HOFMANN, p. 397.
60 SIVAKUMARAN, Non-International Armed Conflict, p. 472.
61 SIVAKUMARAN, Non-International Armed Conflict, p. 472.

national public opinion; (…) the growing strength and vigilance of international and national civil societies; and media exposure.[62]

62 Children and Armed Conflict: Report of the UN Secretary-General, UN Doc. A/59/695-S/2005/72, 9 February 2005, para 77; see SIVAKUMARAN, Non-International Armed Conflict, p. 472.

CHAPTER 18

Remedies for Non-belligerent States

1 Obligation and Entitlement to Act

1.1 *Obligation to Ensure Respect of IHL*

Common Article 1 of the GCs provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". The same provision is also found in AP I with regard to compliance with the Protocol.[1] However, the scope of this provision continues to be debated in the doctrine. While it is widely accepted that this provision includes originally an internal component, that each Party to the Geneva Conventions must ensure that the Conventions are respected at all times not only by its armed forces and its authorities, but also by its population as a whole, there is controversy as to whether it includes also an external component, that States not involved in a particular armed conflict have an obligation to take measures to ensure compliance with the Geneva Conventions by the parties to the conflict. The vast majority of authors in the doctrine argue that the article includes also an 'external' obligation to all States to "ensure" compliance by other States during armed conflicts, even if they are themselves not a party to the conflict.[2] Also the ICRC has confirmed this view repeatedly in its Commentaries, including in its updated Commentaries from 2016 and 2017 on the GCs I and II, stating that the obligation to "ensure respect" according to Common Article 1 to the GCs is not limited to conduct of the parties to a conflict, but includes also the requirement that non-belligerent State parties do all in their power to ensure that international humanitarian law is respected universally.[3] Yet, in the 2020 updated Commentary on GC III, the ICRC stated (for the first time) that:

> [t]here is disagreement as to the legal nature of the positive component of the duty to ensure respect by others because the content of the

1 Further also in AP III.

2 SCHMITT/WATTS, p. 677.

3 For example, earlier in PICTET, Commentary on the Third Geneva Convention, p. 18; or in ICRC Commentary on the APs, para. 45; recently also in ICRC Commentary on GC III of 2020; paras. 153–222; ICRC Commentary on GC II of 2017, paras. 147–148,175–179, 186–95 and ICRC Commentary on GC I of 2016, paras. 125–126, 153–179.

> obligation is not clearly defined and its concretization to a large extent left to the High Contracting Parties.[4]

This statement led to new discussions in the doctrine on the meaning of Common Article 1.[5] In light of the recent discussions, the present book seeks to assess the scope of the duty "to ensure respect" under Common Article 1: For this purpose, first, the different views on the drafting history of the obligation will be shortly outlined (1.1.1). Secondly, the subsequent practices (1.1.2) by States, intergovernmental organisations and international tribunals will be highlighted. Finally, having established the existence of this external component of the obligation, it will be outlined that this is also applied in situations of non-international armed conflict (1.1.3) and what kind of obligations Common Article 1 requires or prohibits the High Contracting Parties to the GCs to undertake (1.1.4).

1.1.1 Views on the Drafting History

KALSHOVEN, in his widely acclaimed analysis on the drafting history of Common Article 1, comes to the conclusion that nothing in the *travaux préparatoires* justifies an interpretation that States (not involved in an armed conflict) have an obligation under international law to ensure respect for the Geneva Conventions by other States in conflict. He argues that the undertaking 'to ensure respect' was rather meant to oblige a State to ensure respect of the treaty provisions by its authorities and its entire population; the latter with a view to extending the binding effect of the GCs to non-State actors in non-international armed conflict.[6] Of similar view is also GASSER as he states that the duty 'to ensure respect' under Common Art. 1 gives "expression to a strong moral and political commitment", but it does not impose any legal obligations on States not parties to a conflict.[7] BUGNION, on the other hand, comes to a more neutral conclusion with regard to the *travaux préparatoires* to the GCs and claims that the internal as well as the external aspects of the duty of respect were presented at the Diplomatic Conference of 1949, but no decision of understanding was taken between them. He therefore argues, that the *travaux préparatoires* are not conclusive when it comes to construing the scope of Common Article 1.[8] DÖRMANN AND SERRALVO go further and state

4 ICRC, Commentary on GC III, para. 202.
5 For example, SCHMITT/WATTS, p. 678 f.; ROBSON, online post on *opinio iuris*.
6 KALSHOVEN, Untertaking to Respect and Ensure Respect, p. 13 ff.
7 GASSER, Ensuring Respect, p. 48.
8 BUGNION, p. 1080 f.

that based on the *travaux prépartoires* it can be said, that it is unlikely that delegates had a narrow understanding of the undertaking to' ensure respect' and that they have chosen a broad formulation that accommodates an external scope.[9] They base their argumentation on the fact that when the obligation to ensure respect was first introduced and presented by the ICRC at the International Red Cross Conference in Stockholm in 1948, the ICRC presented a set of remarks alongside the text. In these remarks, it has stated, with regard to the duty to ensure:

> The ICRC believes it is necessary to stress that if the system of protection of the Convention is to be effective, the High Contracting Parties cannot confine themselves to implementing the Convention. They must also do everything in their power to ensure that the humanitarian principles on which the Convention is based are *universally* applied (emphasis added).[10]

And during the Diplomatic Conference in 1949, Mr. Pilloud, speaking on behalf of the ICRC, pointed out that

> in submitting its proposals to the Stockholm Conference, the International Committee of the Red Cross emphasized that the Contracting Parties should not confine themselves to applying the Conventions themselves, but should do all in their power to see that the basic humanitarian principles of the Conventions were *universally* applied (emphasis added).

While KALSHOVEN argues that the authors used the word 'universal' to ensure respect for the GCs by all parties (especially in times of civil war or non-international armed conflict),[11] DÖRMANN AND SERRALVO are of the opinion

> "[t]hat the ordinary meaning of the term 'universal' used in the ICRC remarks is particularly univocal and one can comfortably assert that, at least in the domain of international law, it means the very opposite of "domestic."[12]

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9 DÖRMANN/SERRALVO, p. 712 f.

10 ICRC, Draft Revised or New Conventions for the Protection of War Victims, Geneva, May 1948, p. 5.

11 KALSHOVEN, Undertaking to Respect and Ensure Respect, p. 14.

12 DÖRMANN/SERRALVO, p. 714; Also other scholars agree with a wider reading of the term 'universal', for example, ERIC DAVID, Principes de Droit des Conflits Armés, Bruylant,

They further point out, that given that those remarks had been circulated to all participants at the Stockholm Conference in 1948 – and given that the ICRC had also issued a clear statement in this regard at the Diplomatic conference in 1949 and none of the delegates opposed or raised any issues regarding those statement, that it is unlikely that the delegates had a narrow understanding of the obligation to ensure respect.[13] Even if DÖRMANN AND SERRALVO's argumentation should not be ultimately convincing for some, it at least shows that KALSHOVEN's interpretation of the *travaux préparatoires* is not beyond reasonable doubt. Thus, against this background, it can be at least agreed with BUGNION that the *travaux préparatoires* are not conclusive when it comes to interpreting the scope of application of Common Article 1.

In this regard it is also to note, as KÜNZLI mentions correctly, that KLASHOVEN's view relies only on the historical interpretation which is according to Article 32 of VCLT a supplementary means of interpretation, that applies if the other methods of interpretation do not lead to a clear result and leave the meaning "ambiguous or obscure" or to a result that is "manifestly absurd or unreasonable."[14] In contrast, as a primary source for the interpretation of international treaties, Article 31 of VCLT provides for a dynamic interpretation which, in addition to the interpretation on the wording and the object and purpose of a treaty, also takes into account any subsequent agreement and practice of the contracting States, and any relevant rule of international law applicable in the relations between the parties.[15] In the following, it will therefore be shown that based on subsequent practice of the contracting parties (which is more relevant to the interpretation of the obligation under Common Article 1), it can be stated that even if not at the time of the adoption of the GCs, then at the latest afterwards, States have recognised the external component of the obligation to the 'duty to respect'.

1.1.2 Subsequent Practice

It was not until 1968 that there was an explicit reference to obligations of non-belligerent States to enforce IHL: the United Nations International Conference on Human Rights in Theranreferred in the preamble to Resolution XXIII to theStates parties to the GC's responsibility to "take steps to ensure respect of these humanitarian rules in all circumstances by other States, even if they are

Brussels, 2008, para. 3.13: « une application universelle ne se limite évidemment pas à une application nationale. »

13 DÖRMANN/SERRALVO, p. 715.

14 KÜNZLI, p. 326.

15 See on this KÜNZLI, p. 326; and also DÖRMANN/SERRALVO, p. 711.

not themselves directly involved in an armed conflict."[16] Yet, it is not entirely clear whether the term 'responsibility' referred at this time to a legal obligation or something less.[17] Subsequently, however, the ICJ has on several occasions reaffirmed the mandatory nature of the obligation to ensure compliance. For example, in the *Nicaragua Case*, the Court held that although the United States was not a party to the non-international armed conflict, it was obliged to ensure compliance with the Geneva Conventions in all circumstances.[18] In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ explicitly emphasised that

> every State party to [the Fourth Geneva Convention], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.[19]

Also the Security Council and the UN General Assembly have repeatedly affirmed in their resolutions the existence of a legal obligation for third States to ensure respect for IHL in conflicts in which they are not involved.[20] An important role is further played by the ICRC which consistently emphasised in its practice the external aspect of Common Article 1 and has also (confidentially and publicly) encouraged States, which were not party to a conflict, for example to use their influence in order to ensure respect for IHL.[21]

Further, an acceptance of an obligation of third States to ensure compliance with IHL can also be established by practice of individual States. For example, during the armed conflict in Libya in 2011, many countries condemned

16 UN International Conference on Human Rights, Resolution XXIII: Human Rights in Armed Conflict, Teheran, 12 May 1968, preamble, available at: www1.umn.edu/humanrts/instree/1968a.htm.

17 DÖRMANN/SERRALVO, p. 716 f.

18 ICJ, Judgement, *Nicaragua v. United States of America*, para. 220; see on this also KÜNZLI, p. 329.

19 ICJ, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 158.

20 For example, UN SC, Resolution 681 (1990), UN Doc. S/RES/681, 20 December 1990; UN SC Res. 764 (1992), UN Doc. S/RES/764, 13 July 1992; UN GA, Resolution 45/69, UN Doc. A/RES/45/69, 6 December 1990, UN GA, Resolution 60/105, UN Doc. A/RES/60/105, 8 December 2005; On the overall topic, see DÖRMANN/SERRALVO, p. 717 f. with further references.

21 ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Geneva, December 2003, p. 47, available at: www.icrc.org/eng/assets/files/other/ihlcontemp_armedconflicts_final_ang.pdf; see DÖRMANN/SERRALVO, p. 719 with further references.

the indiscriminate attacks resulting in civilian deaths and called on the Libyan government to respect international humanitarian law.[22] And also, the current ongoing armed conflict in Syria has invoked a variety of responses from third countries seeking to ensure compliance with IHL by the conflict parties. For example, in May 2012, the US, several European countries and Australia expelled Syrian diplomats from their territories as a protest action against the killing of civilians in the Syrian city of Houla.[23]

In the light of the practice, it is the prevailing doctrine that Common Article 1 of the GCs not only provides an entitlement but also an obligation vis-à-vis the non-participating third countries to ensure respect of IHL by conflicting parties.[24] The author of the present book sees no reason to contradict this interpretation.

1.1.3 In Situations of Non-international Armed Conflict

Since Article 1 of the GCs refers to all Articles of the Conventions, including Common Article 3, it is unanimously understood that non-belligerent States also have in respect of non-international armed conflicts the duty to ensure respect of the IHL obligations.[25] The ICJ confirmed this view in the *Case of Nicaragua,* and stated that the duty to ensure respect is a "general principle of humanitarian law" and applies therefore also in the scope of Common Article 3 of the GCs.[26] However, AP II does not have a similar provision, and since the wording in Common Article 1 clearly refers to the provisions of the Convention, an extension of the duty to ensure respect to AP II cannot be justified.[27] But since the obligation to provide humanitarian relief is also based on Common Article 3 (as outlined before), non-belligerent States have the obligation to

22 For example, HRC, Council Holds Interactive Dialogue with Commission of Inquiry on alleged Human Rights Violations in Libya, 9 June 2011, available at www.ohchr.org/en/NewsEvents/Pages/ DisplayNews.aspx?NewsID=11131&LangID=E (last visited 31 August 2023).

23 'Several Countries Expel Syrian Diplomats as EU Mulls Joint Expulsion', Al Arabiya News, 29 May 2012, available at: http://english.alarabiya.net/articles/2012/05/29/217206.html (last visited 31 August 2023); on the overall topic: DÖRMANN/SERRALVO, p. 719 with further references.

24 For example, KÜNZLI, p. 329 with further references; DÖRMANN/SERRALVO, p. 721; KESSLER, p. 498 ff.; BREHM, p. 371 with references of other supporting authors.

25 FRUTIG, p. 309 with further references.

26 ICJ stated in *Nicaragua v. US* that States shall not "encourage persons or groups engaged in the conflict (…) to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions," which has been interpreted in the literature as being applicable to non-international armed conflicts in the sense of Common Article 3, see ICJ, *Nicaragua v. US*, para. 114; see also FRUTIG, p 183.

27 See on this also FOCARELLI, p. 159.

ensure respect also with regard to the arbitrary withholding of consent to relief operations.[28]

1.1.4 Nature and Content of the Duty to Ensure Respect

The duty to ensure respect for IHL is an obligation *due diligence*. The ICJ found in the *Case of Bosnia and Herzegovina v. Serbia and Montenegro* that the obligation to prevent genocide enshrined in Article 1 of the Genocide Convention as an obligation *due diligence* requires that States use "all means reasonably available to them" and that a State can be held under that obligation only responsibility if it has "manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide". It further states that *due diligence* can only be assessed in concerto.[29] Thus, what can be required of a non-belligerent State under the duty to ensure respect of IHL, has to be decided on a case-by-case basis. A relevant factor in this respect is for example the relationship between the wrongfully acting conflict party and the non-belligerent State. A State with close political, economic and/or military relations (e.g. through the equipping and training of armed forces or the joint planning of operations) with one of the parties to the conflict has therefore a strong obligation to ensure its ally's compliance with IHL.[30]

In respect of the content of the duty to ensure respect, it is generally agreed since the *Case of Nicaragua*, that non-belligerent States are "under an obligation not to encourage" conflict parties to act in violation of IHL.[31] Further, according to the general regime of State responsibility, non-belligerent States have by virtue not only the duty to ensure respect of IHL but also the obligation not to knowingly aid or assist in the commission of violations of IHL.[32] Further, it includes also positive obligations, such as stopping IHL violations. It

28 AKANDE/GILLARD, Oxford Guidance, p. 46.

29 ICJ, Judgmenet, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Reports 2007, para. 430.

30 GASSER, p. 84; on the overall topic, see DÖRMANN/SERRALVO, p. 724; see also RODENHÄUSER, p. 13.

31 ICJ, Judgement, *Nicaragua v. United States of America*, para. 220; hereto KÜNZLI, p. 329; See also International Humanitarian Law and the Challenges of Contemporary Armed Con icts, report prepared by the International Committee of the Red Cross, 28th International Conference of the Red Cross and Red Crescent, 2–6 December 2003, pp. 22 and 48.

32 Article 16 ILC-Draft Articles on State Responsibility; hereto DÖRMANN/SERRALVO, p. 727.

is argued that Parties have under Common Article 1 the duty to use their influence and to take appropriate measures to end continuing violations of IHL. This argumentation is based on Customary Rule 144, identified by ICRC in its Study on Customary Law, which provides, inter alia, that States must "use their influence, within their means, to bring violations of international humanitarian law to an end."[33] Support for the existence of such an obligation, in addition to many examples of the practice mentioned before, is particularly seen in Article 89 of AP I, which states that "[i]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter."[34]

1.2 *Entitlement to Invoke State Responsibility*

It is important to distinguish the obligation to ensure respect under Common Art. 1 to GCs from the right to act in case of violations of *erga omnes* obligations according to Art. 48 ILC Draft Articles on State Responsibility. Common Article 1 goes beyond an entitlement for non-belligerent States under ILC Draft Articles. It establishes not only a right, but an international legal obligation to act. Having said that, an entitlement under the ILC-Draft Articles on State Responsibility can nevertheless be relevant for non-belligerent States with regard to IHL breaches of another State, for example in situations where a breach concern AP II. In respect of AP II, non-belligerent State have (as mentioned before) no duty to ensure the respect. Thus, in this regard they require an entitlement to invoke the responsibility of the affected State. It is therefore examined if they could refer to an entitlement under Article 48 ILC-Draft Article (1.2.2). Further, where non-belligerent States intend to apply countermeasure, they must be an injured State. Here, non-belligerent States have therefore to prove that they are entitled under Article 42 ILC-Draft Articles as an injured State (1.2.3). But before these issues are addressed, the question of whether international organisations can also claim State responsibility (which is important for humanitarian organisations as mentioned before) is briefly explained (1.2.1).

1.2.1 Entitlement for International Organisations?

The ILC Draft Articles on State Responsibility concerns only the invocation of the responsibility by other States. They do not deal with the invocation of

33 OHCHR, p. 71.

34 Dörmann/Serralvo, p. 728 with further references.

State responsibility by individuals or international entities other than States.[35] Whilst the ILC Draft recognises in Article 33(2) the possibility that obligation to compensation may also exist toward individual persons or entities other than States, they do not entitle them to invoke State responsibility.[36] Particularly international organisations were deliberately left aside by the ILC in its Draft Articles on State Responsibility since they wanted them to be subject of the ILC Draft Articles on the Responsibility of International Organisations. As mentioned before, the intention of the latter Draft Articles was to cover issues of responsibility that concern international organisations which were not addressed in the Draft Articles on the responsibility of States. However, the gap of invocation of the responsibility of a State by an international organisation was finally not filled by the following Draft Articles on Responsibility of International Organisations. The Special Rapporteur on Responsibility of International Organisations explained that since such an adaption in the new Draft Articles would have required also a modification of the existing Draft Articles on State Responsibility which explicitly states that only other State have a right to invoke the State responsibility, the ILC was reluctant.[37] The Special Rapporteur however concludes, that analogy would nevertheless allow the application of the rules on invocation of State responsibility for international organisations without creating new rules or modifying existing rules. Thus, the following explanations on entitlement, invocation and countermeasures are also valid for international organisations and can be applied per analogy.

1.2.2 Possible Grounds for Invocation

As mentioned before, the ILC Draft Articles on State Responsibility provide two possible grounds for States to claim the responsibility of another State: Article

35 ILC Report p. 95.

36 Article 33 (2) ILC Draft Articles: "This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State;" see SASSÒLI, p. 418, ILC Report, p. 95.

37 The Special Rapporteur stated in its seventh report on responsibility of international organizations to the ILC: "some States suggested that part three should also include the invocation by an international organization of the international responsibility of a State. However, this is a matter which lies outside the definition of the scope in article 1. Moreover, if it was felt necessary to specify the rules applying to the invocation of the responsibility of a State by an international organization, the appropriate place would be the articles on State responsibility and not the current draft articles. Various articles of part three on State responsibility, such as articles 42, 43, 45 to 50, 52 and 54, could conceivably be extended to also cover the invocation of responsibility by international organizations," UN Doc. A/CN.4/610, 27 March 2009, p. 75.

42 of the ILC Draft Articles grants this right to an injured State. Article 48(1)(b) of the ILC Draft Articles extends this right to any State (without requiring it to be specifically injured) if the breached obligation affects a collective interest and is therefore owed *erga omnes* to all States of the international community.[38]

1.2.2.1 *Breach of Erga Omnes Obligations*

According to Article 48(1) of the ILC Draft Article on State Responsibility "any State other than an injured State is entitled to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole." This provision is based on the idea that every State of the international community has a legal interest in the protection of certain fundamental rights and the fulfilment of related obligations, which are therefore owed *erga omnes*. In such cases, State responsibility may be invoked by any State even if it is not individually injured within the meaning of Article 42 of the ILC Draft Articles.[39] A State which is entitled to invoke State responsibility under Article 48 is not acting in its individual capacity for having suffered damage, but in its capacity as a member of the international community and in the collective interest.[40] The ICJ instanced as such collective interests "the outlawing of acts of aggression or of genocide," or "the principles and rules concerning basic rights of the human person, such as protection from slavery and racial discrimination."[41]

IHL obligations are considered *erga omnes* obligations, including those applicable in non-international conflicts. Therefore, due to the *erga omnes* nature of IHL obligations, any non-belligerent State is entitled to invoke the responsibility of the affected State on behalf of the international community as a whole in situations where consent to humanitarian assistance has been arbitrarily withheld in violation of the provisions of AP II.[42]

1.2.2.2 *Invocation as an Injured State*

Non-compliance with *erga omnes* obligations may also harm the individual interests of a State if it is particularly injured by the breach of such an obligation, e.g. a coastal State is particularly affected by a breach of a collective obligation to protect the marine environment because it is directly exposed to

38 ILC-Report, p. 117 and 126.
39 ILC Report, p. 126.
40 ILC Resport, p. 126.
41 ICJ, *Barcalona Traction, Belgium v. Spain*, para. 33, to the whole ILC Report, p. 33 (4).
42 KUIJT, p. 58 f.; see also Stoffels, p. 524.

pollution.[43] The question therefore arises as to whether non-belligerent States can also invoke the responsibility of the affected State as an injured State and take countermeasures in situations of arbitrary withholding of consent to relief. This leads to the next question, whether violations of the law of non-international armed conflict can directly harm another State at all.[44] Article 42 of the ILC Draft Articles on State Responsibility defines that a State is considered to have been injured if the breached obligation is owed to it individually or, where it is owed to a group of States or the international community as a whole, if the breached obligation has a special impact on the State or is of such a nature as to alter the position of all States to which the obligation is owed.[45]

As outlined before, according to Common Article 1 of the GCs and AP I all States have to ensure the respect of IHL and the obligations are owed *erga omnes* to all States. However, Common Article 1 and the *erga omnes* nature of IHL obligations do not qualify all States per se as individually injured States by every violation of IHL.[46] As Article 42 of the ILC Draft Articles on State Responsibility states, for obligations which are owed to more than one State it is further required that the breach either affects one State in a particular way which distinguishes it from other States to which the obligation is also owed or the obligation must be of such a nature that its breach injures every State to which the obligation is owed. The latter category includes obligations where each party's performance is conditioned upon, so that a breach by one party changes the position of each party with respect to the performance of that obligation. Examples are obligations in a disarmament treaty or a treaty on nuclear-free zones.[47]

The obligation of the affected State to provide humanitarian relief is not of such a nature that it is conditioned and dependent on the performance of other States, so that a breach by arbitrary withholding of consent to relief operations would affect the position of all States. According to SASSÒLI IHL treaties do in general not fall within this category. He explains that the sole fact that IHL obligations are integral in the sense that they can only either be respected or violated towards all States do not qualify them *per se* as obligations where each party's performance is interdependent.[48] Otherwise, all *erga omnes* obligations could be considered as interdependent. It thus remains to be determined

43 ILC Report, p. 127.
44 For example, SASSÒLI, p. 423.
45 ILC Report, p. 117.
46 See on the discussion hereto SASSÒLI, p. 423 f.
47 ILC Report, p. 119.
48 SASSÒLI, p. 423.

whether a State might be particularly affected in situations of arbitrary denial of consent, so that it can be considered an injured State. The Draft Articles of the ILC do not define the nature or extent of the impact that a State endure in order to be regarded as particularly affected and thus as "injured." This must be assessed on a case-by-case basis. In general, however, it can be said that a State is to be considered particularly affected if the consequences of the violation it experiences are more severe and distinguish it from other States to which the obligation is also owed.[49]

According to current doctrine, other States are not considered to be injured when a State arbitrarily withholds its consent to the provision of relief on its territory.[50] It is argued that the civilians who are not relieved are the injured parties, while the States wishing to take countermeasures are non-injured States.[51] The author of this book doesn't agree with this view. Even if the primary victims of withholding consent to humanitarian relief are civilians, practice has shown that situations of armed conflict and humanitarian crisis in one State can still have a particular impact on neighbouring States, for example through increased refugee movements. This is currently the case in Syria's neighbouring countries, which host the largest number of Syrian refugees of any country in the world. About 5.5 million of the approximately 6.8 Syrian refugees living outside the country are registered in one of the neighbouring countries, such as Turkey, Lebanon, Jordan, Iraq, Egypt and other North African countries.[52] Even before the outbreak of the armed conflict in Syria, these countries were considered to be the most densely populated refugee areas in the world. It is indisputable that the flow of refugees has increased as the humanitarian crisis in Syria has grown, putting enormous strain on the infrastructure, social services, economies and populations of neighbouring countries.[53] The author of

49 See ILC Report, p. 119.

50 AKANDE/GILLARD, Oxford Guidance, p. 54.

51 RYNGAERT, Countermeasures, EJIL Talk Blog.

52 UNHCR, Operational portal on the situation of Syrian refugees, see https://data2.unhcr.org/en/situations/syria (last visited 31 August 2023); UNHCR, Stories: 'Twelve years on, Syrian refugees face deepening debt and hunger', 15 March 2023, see https://www.unhcr.org/news/twelve-years-syrian-refugees-face-deepening-debt-and-hunger (last visited 31 August 2023).

53 Report on the humanitarian situation of refugees in the countries neighbouring Syria, Rapporteur Manlio Di Stefano for the Parliamentary Assembly of the Council of Europe, Doc. 14276, Reference 4293, 30 May 2017, p. 1 and 3 f.; The Security Council expressed 2014 in its considerations of the UN SC Resolution 2139 (2014) "grave concern at the increasing number of refugees and internally displaced persons caused by the conflict in Syria, which has a destabilizing impact on the entire region, and underscoring its appreciation for the significant and admirable efforts that have been made by the countries of

this book therefore concludes, contrary to the existing opinion in the doctrine, that an arbitrary withholding of consent to relief and the resulting aggravation of the humanitarian crisis, at least if it occurs consistently over a longer period of time, can lead to consequences that may affect a neighbouring State more than other States, so that the violation of the obligation to provide humanitarian assistance from that point on should entitle the neighbouring State to invoke State responsibility even as an injured State. The fact that the violation primarily affects the civilian population of the violating State cannot be regarded as an obstacle to the qualification of another State as injured. The ICJ's judgment of 22 July 2022 on Myanmar's preliminary objections in the case of *The Gambia v Myanmar*, discussed in more detail below, also suggests such an understanding.[54]

1.2.3 Invocation of State Responsibility

1.2.3.1 *Process of Invocation*

Invocation of responsibility is not given by simply criticising a breach or protesting or calling the wrongful actor to observance of its international duties.[55] Invocation requires moreover measures which are rather formal in their nature and involves further claims such as demand of cessation or reparation.[56] What cessation and reparation could be in a situation of arbitrary withholding of consent has been already outlined before as possible consequences for the affected State in case of State responsibility. And possible measures to manifest those claims will be discussed later under possible non-judicial and judicial enforcement mechanism which are available to non-belligerent States to enforce their demands (see 2 and 3). It should be noted that what kind of measures non-belligerent States may or must take when violations of international law occur is unclear since there are no precise legal rules and the practice of non-belligerent intervention is not systematically recorded. But the duty to ensure respect of law under IHL indicates that a State must at least act in such a way. As SASSÒLI stated with regard to State responsibility, if only every State would systematically and regardless of other considerations invoke

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the region, notably Lebanon, Jordan, Turkey, Iraq and Egypt, to accommodate the more than 2.4 million refugees who have fled Syria as a result of the ongoing violence, while acknowledging the enormous political, socioeconomic and financial impact of the presence of large-scale populations in these countries."

54 See Chapter 18 3.1.

55 Such actions do not require a specific title or interest of a State. They are considered as informal diplomatic contacts which are allowed at any time, see on this ILC Report, p. 117.

56 On the overall topic, see also ILC Report, p. 117.

the responsibility of a responsible State as soon as it estimates that a violation of international humanitarian law to have occurred and claim cessation and reparation in the interest of the victims, as it is provided under Draft Article 48(2) then already much would be gained.[57]

With regard to the process of invocation of State responsibility, Article 43 ILC Draft Article states that the State wishing to invoke responsibility must give first a notice to the responsible State and call its attention to the situation.[58] This requirement applies to the injured State according to Article 42 as well as to States invoking responsibility under Article 48. When giving notice of a claim, the concerned State may specify what conduct in its view is required of the responsible State to cease a continuing wrongful act or what form of reparation should be taken. However, such indications are not binding to the responsible State. The invoking State can only require the responsible State to comply with its obligations and demand for cessation or reparation, but the precise consequences of an internationally wrongful cannot be stipulated or defined by the injured State.[59] In situations of arbitrary withholding of consent, the invoking States may therefore not demand that the wrongful State has to consent to relief operation, but only that it does not any further withhold consent to relief operation on arbitrary grounds.

1.2.3.2 *Claim of Cessation and Reparation*

Injured States in the sense of Article 42 ILC Draft Articles are entitled to all means of redress contemplated in the Draft Articles.[60] In contrast hereto, States other than injured State which are entitled on the basis of a breach of an *erga omnes* can claim according to Article 48(2)(a) ILC Draft Articles from the responsible State "cessation of the internationally wrongful act, and assurances and guarantees of non-repetition." The list given on possible claims in paragraph 2 of Article 48 ILC Draft Articles is exhaustive and is a more limited range of rights compared to those of injured States according to Article 42 ILC Draft Articles.[61] Since such kind of States are considered as not injured in their right, they do not enjoy the same right as injured States to claim reparation on their own account. But Article 48(2)(b) provides for a not injured State nevertheless the possibility to claim reparation, if this is in the interest of an injured State or the beneficiaries of the obligation breached.[62] This possibility

57 SASSÒLI, State Responsibility, p. 432.
58 ILC Report, p. 119 f.
59 ILC Report, p. 119.
60 ILC Report, p. 117.
61 ILC Report, p. 127.
62 ILC Report, p. 127.

is foreseen as it may well be that in cases of Article 48 there is no State which is individually injured by the breach but there are other beneficiaries of the obligation breached or where the injured State is unable to act for itself. Since it might be desirable that also in such situations some States are in a position to claim reparation, Article 48(2)(b) ILC Draft Articles provide this possibility as a means for protecting the community or collective interest at stake.[63] In situations of arbitrary withholding of consent to relief operations this is of particular importance, as other States are generally not considered as injured. At the same time, the civilian population of the responsible State which are also injured in their rights by arbitrary withholding of consent, are as individual beneficiaries of the breached obligation not entitled to invoke State responsibility. Article 48(2)(b) ILC Draft Articles enables therefore that in such situations non-belligerent States may claim reparation in the interest of the affected civilians. Where non-belligerent neighbouring States may assert to be injured by arbitrary withholding of consent, they may further claim cessation and reparation also in their own interest according to Article 42 ILC Draft Articles. And based on Article 48(2)(b) of the ILC Draft Articles other non-belligerent States may also claim reparation in the interest of the injured neighbouring States if they are not able to act in their own interest.

2 Non-judicial Mechanisms

Chapters 2.1 and 2.2 outline possible measures that non-belligerent States can adopt to fulfil their obligation to ensure respect of IHL or to invoke the responsibility of the State.

2.1 *Possible Measures by the Non-belligerent State Itself*

2.1.1 Diplomatic Talks and Mediation

In order to ensure respect of law, non-belligerent States could also use their political power and good relationship with parties to a conflict and conduct diplomatic talks to convince them to act in accordance with the law.[64] Such diplomatic approaches can also be taken by States on request of the ICRC, as outlined before, or as an act in compliance to a Security Council Resolution. The diplomatic path is a frequently used instrument by States as part of their political engagement to ensure freedom in the international community.

63 ILC Report, p. 127 f.

64 Action by the ICRC, p. 396.

Diplomatic talks can be provided in different forms, they can be either held bilaterally, informally and confidentially at the level of diplomatic officials or as official meetings and conferences with the representatives of one or more conflict parties and also in cooperation with other States or international organisation.[65]

In the context of armed conflict, non-belligerent State have also the possibility to get engaged with consent of the conflict parties, into mediation and peace talks. The goal of such a discussion is to accomplish the end of the hostilities and conclude a peace agreement.[66] However, mediation is not limited to the question of ending the hostilities, but often involves other conflict related problems. Humanitarian access is particularly an important subject in such talks since impediment and withholding of consent to humanitarian relief is often applied as a strategy of the warfare and constitutes therefore an essential part of the ongoing conflict. For that reason, regulations on humanitarian access are often found in ceasefire and peace agreements.[67] In situations where a comprehensive consensus on important aspects of the conflict seems politically unlikely because of fundamental mistrust within the conflict parties (which is often the case), the mediation can also be limited on so called confidence building measures (CBMs) where only certain, relatively less adverse topics are discussed. Some of the very first CBMs used in the negotiating process, are typically humanitarian CBMs where application of basic humanitarian principles is discussed.[68] Thus, as mediators, non-belligerents States also

65 For example, Gasser, Einführung Völkerrecht, p. 202.

66 There are various types of peace agreements which can be concluded during a peace process: there are Cessation of Hostilities or Ceasefire Agreements, Pre-Negotiation Agreements, Interim or Preliminary Agreements, Comprehensive and Framework Agreements, Implementation Agreements; for more information see Nita Yawanarajah/ Julian Ouellet, September 2003, online available at https://www.beyondintractability.org/essay/structuring_peace_agree (last visited 31 August 2023).

67 For example, Internally Displaced Persons: Sudan Comprehensive Peace Agreement, Annexure I: Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices (Signed at Naivasha, Kenya on 31st December 2004), 1.10: "The Parties shall commit themselves to render and facilitate humanitarian assistance through creation of conditions conducive to the provision of urgent humanitarian assistance to displaced persons, refugees and other affected persons and their right to return;" or Statement by the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone on the Delivery of Humanitarian Assistance in Sierra Leone, 03/06/1999, Annex 4 of the Lome Peace Agreement which outlines details on safe and unhindered access of humanitarian agencies and provided for the establishment of an Implementation Committee, available online at https://www.peaceagreements.org/view/63/ and https://peaceaccords.nd.edu (last visited 31 August 2023).

68 Simon/Siegfried, p. 1 and 67.

have the possibility to bring the subject of humanitarian access and problem of arbitrary withholding of consent as part of CBMs onto the agenda and discuss this separately from other subjects of the conflict.

2.1.2 Retorsion, in Contrast to Suspension or Determination

Non-belligerent States could also react in response to an arbitrary withholding of consent to relief operations with retorsion. As an unfriendly, yet lawfully coercive measure, retorsion has the potential to put pressure on the wrongful acting party and to influence its behaviour positively. States also have, according to Article 60 of the Vienna Convention, the possibility to invoke the breach of treaty obligations by another State party as a valid ground for suspension or termination of the underlying treaty.[69] But in contrast to retorsion, suspending or terminating the underlying treaties of the breached obligations, such as the Geneva Conventions or the human right treaties, will not exert any particular pressure on the wrongfully acting State to act in accordance to its obligations since this does not have a negative effect for the concerned State which finds itself in a non-international armed conflict. Retorsions are therefore more accurate responses for situations of arbitrary withholding of consent during non-international armed conflicts. Frequently applied retorsions in the context of armed conflict are, for example, severance of diplomatic or consular relations or reduction or withdrawal of aid programmes,[70] or protesting or publicly denunciating the wrongful conduct of the concerned conflict party. Also, suspending voluntary material support could be a successful act of retorsion, depending on the importance of the respective support.[71]

It should be noted, that international law provides retorsion as a measure only against another State, it does not include actions against non-State armed groups since they are not considered as legal subjects of international law. This does not, however, preclude the factual possibility, that non-belligerent States, who are providing support to an opposing armed group without being involved as a party to the conflict, may in such situations nevertheless take unfriendly acts against those armed groups and suspend their support in order to provide pressure and influence their behaviour, even if it is not formally considered as an act of retorsion according to international law.

69 Article 60 (2)(a) VLCT; see also ILC Report, State Responsibility p. 117.

70 Instead of many, see KÄLIN/EPINEY/CARRONI/KÜNZLI, p. 296.

71 On the overall topic, see PALWANKAR, online Article.

2.1.3 Countermeasures

2.1.3.1 *Right to Take Countermeasures in General*

Under international law, non-belligerent States also have the possibility to take coercive measures which are unlawful in their nature in order to convince another State to act in accordance with its obligations. Such measures are considered as justified if they are applied as countermeasures in response to a prior internationally wrongful act of another State, or if they procure cessation and reparation from the responsible State and are proportional and not excessive in relation to the act which has promoted the response.[72] Countermeasures are also explicitly mentioned in the ILC-Draft Articles on State Responsibility as a ground of justification for unlawful actions of States (Article 22 and 49 ff. ILC Draft Articles).[73] Countermeasures can also be taken by international organisations under similar conditions as States.[74] In the case of international organisations, it is further required that the taken countermeasures are not inconsistent with the internal rules of the organisation.[75]

Like reprisals, countermeasures are an instrument of law enforcement under international law. As such, they are not looked at as measures which can be taken by States in relation to non-State armed groups. However, non-belligerent States can nevertheless take actions in response to wrongful acts or threats of non-State armed groups which are in nature similar to the forms of countermeasures which can be taken against States, even though not under guise of countermeasure. International sanctions are a particularly popular form of action which is taken by the international community in situations of significant breaches of law by non-State armed groups. There will therefore be a brief digression later on the subject of international sanctions against armed groups.[76]

2.1.3.2 *Countermeasures for Breaches of Erga Omnes Obligation*

According to Article 49 in conjunction with Article 42 of the ILC Draft Articles on State Responsibility, injured States are entitled to take countermeasures. Since in situations of arbitrary withholding of consent during

72 Kälin/Epiney/Caroni/Künzli, p. 296 f.

73 Article 22 ILC-Draft Articles, see also Kälin/Epiney/Caroni/Künzli, p. 296.

74 Akande/Gillard, Oxford Guidance, p. 48; Gillard, p. 34.

75 As a side note, where an international organisation takes countermeasure in response to a breach by a member State of obligations under the rules of that organisation, it is further required that the taken countermeasures must be provided for by those rules; see on the whole, Oxford Guidance, section 153 referring on Article 22(2)(b) and (3) of the ILC Articles on the Responsibility of International Organisations.

76 See Chapter 18 2.1 (2.1.3.4).

non-international armed conflicts, if at all, only neighbouring States could be injured, the majority of non-belligerent States are not directly injured. This therefore raises the question if non-belligerent States that can invoke the State responsibility based on Article 48 of the ILC Draft Articles as "States other than injured States" for breaches of *erga omnes* obligation, may also have the right to take countermeasures.[77] Similar to the discussion regarding the claim for reparation according to Article 48(2) of the ILC Draft Articles, it is important to note that the possibility for not injured States to take countermeasures is also relevant in situations of arbitrary withholding of consent to relief actions, since directly affected by the withholding of consent are first and foremost the civilians, who are also the beneficiaries of the obligation to provide relief. They are, however, as individuals not entitled to take countermeasures. Thus, if only injured States should be capable to take countermeasures, it would leave a gap in the law in situations where there is no injured State or where the injured State is unable to act, while individuals which are directly affected by the wrongful act are not entitled to take countermeasures.[78]

The ILC Draft Articles on State Responsibility left for such situations therefore in Article 54 ILC a potential entitlement for other than injured States to take measures. Article 54 of the ILC Draft Articles states that the chapter on countermeasures in the ILC Draft Articles does not prejudice the right of any State which is entitled to invoke State responsibility by virtue of Article 48 ILC Draft Articles, "to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached."[79] However, in 2001, at the time of the adoption of the Draft Articles on State Responsibility, the ILC concluded in its commentary that it could not determine with certainty whether an entitlement to adopt countermeasures in the interest of individual beneficiaries or an injured State by other States was recognised by the international community.

77 ILC Draft Articles, Article 54; RYNGAERT, Countermeasures, EJIL Talk Blog; see on the necessity of countermeasures for *erga omnes* obligations also KÄLIN/EPINEY/CARONI/KÜNZLI, p. 297.

78 On the whole, see RYNGAERT, Countermeasures, EJIL Talk Blog; STOFFELS, p. 524; SASSÒLI, State responsibility, p. 427 f.

79 Article 54 ILC Draft Articles: "This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest (…) of the beneficiaries of the obligation breached," on the overall topic, see RYNGAERT, Countermeasures, EJIL Talk Blog.

Consequently, it left this question open for progressive development in international law.[80]

Since then, there have been serval instances where States have taken countermeasures in response to violations of *erga omnes* obligations.[81] Today, it is concluded in the doctrine that there is extensive evidence for State practice and opinion juris in support of a right for a State other than the injured one to take countermeasures in collective interests as an integral part of customary international law.[82] It can therefore be argued that today non-belligerent States which are not injured through arbitrary withholding of consent to relief operations but entitled to invoke a State's responsibility by virtue of Article 48 ILC Draft Articles can nonetheless (on the basis of Article 54 of the Draft Articles) take countermeasure to ensure cessation and reparation from the responsible State in the interest the affected civilians or a neighbouring State which may be injured but not able to act by itself.[83] It is important to note that such an understanding does not intend to open the door to any illegal acts for States. As countermeasures, they must strictly adhere to the before-mentioned requirements for a justified countermeasure and show clearly that it is taken in the interest of the injured State or the affected civilians.

2.1.3.3 *Forms of Countermeasures*

Since no State has adopted until today countermeasures particularly in response to an arbitrary withholding of consent to relief actions, it is uncertain as to what kind of measures could be appropriate in such situations.[84] The Oxford Guidance proposes that the conduct of humanitarian relief without

80 Sassòli, State responsibility, p. 427 f.; Ryngaert, EJIL Talk Blog; ILC Report, p. 355; It should be noted, that the article speaks of "lawful measures" and not of "counter-measures" in order to not prejudice any position concerning measures which could be justified in the future and taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole; see Article 54 ILC Draft Article on State Responsibility; on the overall topic, see Gillard, p. 32.

81 For example, the imposing of asset freezes by the European Union and the United States in response to the escalating violence against the civilian population in Syria, see EU Council Decision 2013/255/CFSP of 31 May 2013, OJ L 147, 01.06.2013, p. 14; and Section 1(a) US Executive Order 13582 of 17 August 2011, Federal Register, Vol 76, No 162, Monday, August 22, 2011, Presidential Documents, 52209; on the overall topic see, Gillard, p. 32.

82 Katselli, p. 20; Ryngaert, Countermeasures, EJIL Talk Blog; see also Kälin/Epiney/Caroni/Künzli, p. 297.

83 To this conclusion comes also the Oxford Guidance, see Akande/Gillard, Oxford Guidance, p. 54.

84 Gillard, p. 34.

the consent of the concerned conflict party could be regarded as a form of countermeasure, since it would be an unlawful act which is taken in response to a previous wrongful action by the conflict party.[85] The possibility to justify the conduct of relief without consent as a countermeasure has been discussed before in relation to acts which can be taken by humanitarian actors in situations of arbitrary withholding of consent. Readers can therefore be referred to the discussion there. Other more common forms of countermeasures which could also be applied during situations of arbitrary withholding of consent to impact the behaviour of the responsible conflict party are, for example, unilateral sanctions[86] which could exert political or economic pressure on the concerned conflict party.[87] This could be, for example, restrictions or bans on trade goods, particularly arm exports to the concerned State.[88] Capital freezes or travel bans are sanctions often applied to the persons of the wrongful acting government.[89] For example, in response to the escalating violence against the civilian population in Syria, the European Union and the United States decided to freeze Syrian assets on their territory.[90]

2.1.3.4 *Excursus: Sanctions against Armed Groups*

Sanctions, particularly freezing of foreign assets, armed embargoes and travel bans are also often measures applied against non-State armed groups and their members as a response to international criminal acts, grave breaches of human rights or terrorism.[91] Blacklisting specific armed groups as terrorist organisations have become a particularly popular method since 9/11. Such sanctions are often applied by supranational institutions such as the UN or EU

85 Akande/Gillard, Oxford Guidance, section 134.

86 The European Union Guidelines on Promoting Compliance with International Humanitarian Law list, for example, various measures which can be taken by non-belligerent States in order to implement their obligation to ensure respect for IHL according to Common Article 1 of the GCs. The adoption of sanctions in accordance with the UN Charter is suggested there, see Council Decision 2013/255/CFSP of 31 May 2013, OJ L 147, 01.06.2013, p. 14.

87 Palwankar, online Article.

88 The European Communities took for example in 1990 an embargo on the sale of arms and other military equipment, and suspended technical and scientific cooperation, see Palwankar, online Article.

89 For example, in 1978, the United States suspended commercial relations with Uganda is a reaction to violations of human rights, see Palwankar, online Article, with further examples.

90 European Council Decision 2013/255/CFSP of 31 May 2013, OJ L 147, 01.06.2013, p. 14.

91 Daglish, p. 1; Hofmann/Schneckener, p. 6.

since a comprehensive international support of sanctions is more effective.[92] In the past decades, there have been a number of 'legal and quasi legal regimes' which supported the application of sanctions as part of counter-terrorism measures. For example, the Terrorist Financing Convention, which is ratified by 185 States, is one of the most universally applied anti-terrorism treaties.[93]

It is acknowledged that in order to harm an armed group, one cannot rely solely on military action. The conditions which allow the armed group to flourish, such as their funding, must also be tackled. International sanctions against non-State armed groups aim therefore to limit funds, arm access and the movement of the armed group. This will, on one side harm, and curtail the military capability of the armed group and discourage the members of the group so that they are put under pressure to act in accordance with law. On the other side, such measures will indirectly penalise those actors who are assisting such groups in breaking international law. This can influence the business behaviour of those actors who will also affect indirectly the non-State armed group.[94]

International sanctions have proved to be hugely significant and effective in practice. Sanctions seem to be, therefore, a promising coercive measure for situations of arbitrary withholding of consent to relief. They are further also a viable alternative to other actions which would urge non-belligerent States to operate within the sovereign territory of a State, like for example the provision of relief without consent of the concerned State which is highly controversial and undesired as outlined before. However, despite the advantages sanctions may have, it has to be kept in mind that sanctions against non-State armed groups can also have negative effects. Sanctions can, for example, lead to a greater violence during conflict because the affected State may see international sanctions against the armed group as a justification and validation to use harsher methods against that group.[95] The non-transparent process

92 This is particularly important in view of the nature of such non-State armed groups. They are a fluid and transnational entity which are embedded within a civilian population, which makes sanctioning them difficult. Without a comprehensive sanction system and international consensus, other States can easily support those groups and provide them with the material and financial support they require to continue their violations of law, for more information, see Dudouet, p. 3 f.

93 Daglish, p. 1 ff.

94 For example, the UN sanctions against Islamic State have also targeted those who funded and supported the group, the UN member States were namely banned from purchasing oil from reserves which were held by IS fighters; for more information, see Daglish, p. 3 f.

95 For example, the Syrian government has in response to blacklisting of radical Islamist opposition groups raised its brutality against civilians and moderate groups by claiming

of listing and the extremely difficult process of de-listing targeted individuals of non-State armed groups has also provoked criticism, particularly with regard to the human rights of the affected persons.[96] Sanctions can have also an unwanted impact on the process of conflict mediation. Backlisting can, for example, be perceived by the prohibited armed group as an affront and make them less willing to engage in negotiations and the mediation process. At the same time, sanctions can inhibit international mediators to act when engaging with a particular non-State armed group who is sanctioned.[97]

It would go beyond of the scope of the present book to discuss indepth all possible detrimental effects sanctions may have and how they should be faced. It is important to note, however, that non-belligerent States must take those contra effects into their consideration when they apply a sanction regime and try to avoid indirect harms or at least keep them as low as possible. It should be further noted that even though sanctions have an important function as law enforcement instruments, their reach is also limited outside the international economic and political sphere. For a comprehensive approach, such coercive measures are therefore often accompanied by additional measures such as judicial enforcement against non-State armed groups at a national and/or international level.[98]

2.1.4 Interferences

An often-discussed question in the context of grave violations of human rights and humanitarian law in situations of non-international armed conflicts is the possibility for non-belligerent States to interfere without the consent of the affected State. In this regard, the most discussed concepts are the humanitarian intervention (4.1) and the responsibility to protect (short R2P, 4.2).

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they are allied with those groups who are blacklisted by the international community, for more information, see DAGLISH, p. 3.

96 Many affected persons have claimed for example that after 9/11, they were wrongfully placed on that list and that this blacklisting constituted a violation of their human rights. It has been argued that on the one hand, the non-transparent process of listing violates the right to a fair hearing and the presumption of innocence. On the other hand, the de-listing process is elusive to those who are targeted and is a very lengthy process; see on this DAGLISH, p.2; on this problematic, see also HOFER, p. 35 ff.

97 For example, with the judgement *Holder v. Humanitarian Law Project*, the US Supreme Court ruled against the non-profit organisation that wanted to advise the PKK on human rights issues; see on this DAGLISH, p. 2; on the overall topic, see also DUDOUET, p. 5 f.

98 For example, in the case of Boko Haram, the UN sanctions following the abduction of 250 schoolgirls in Nigeria were clearly necessary. Nonetheless, the sanctions regime may not actually influence the funding of the group, which appears to rely predominantly on armed robberies, racketeering and extortion; see DAGLISH, p. 5.

2.1.4.1 *Humanitarian Intervention*

Humanitarian intervention is an armed intervention of one or more States in another State in response to grave violations of human rights and/or of international humanitarian law in, for example, cases such as genocide.[99] Humanitarian intervention is in conflict with the principle of sovereignty and the prohibition of non-interference. The doctrine of humanitarian intervention is therefore even today a controversial subject.[100] The UN Security Council officially authorised in 1990 for the first time a military intervention in Iraq in reference to the human rights situation of the Iraqi civilians based on Chapter VIIof the UN Charter.[101] Humanitarian intervention is, however, not an official instrument of the UN Charter.[102] Humanitarian intervention has been also applied without the authorisation of the UN Security Council by the NATO for the intervention in Kosovo in 1999, the legitimacy of which was, and still is, highly contested.[103]

In some cases, humanitarian intervention was applied in the past in order to ensure the provision of humanitarian relief in situations where relief convoys came under attack.[104] However, even though humanitarian interventions have a humanitarian objective, the applied military force in humanitarian interventions are in contrast to the principles of humanitarian relief.[105] While military interventions are led by political motives and are by nature 'highly selective and inequitable',[106] humanitarian relief, on the other hand, has to respect principles such as neutrality, impartiality and independence.[107] Involvement of

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99 GILLARD, p. 4; RYNIKER, p. 527; see also ABIEW, p. 31.

100 Instead of many, see RYNIKER, p. 527.

101 UN SC Resolution 678 (1990).

102 The UN Charter does not explicitly mention a legal right to initiate a humanitarian intervention, see on this BARRY /JEFFERYS, p. 9.

103 The NATO started on 24 March 1999 its intervention into Kosovo with the aim to prevent further human suffering in Kosovo. That invervention is till today the last military intervention that took place without a autorisation of the Securtiy Council; see on this a critical analysis (instead of many) GROMES, p. 1 ff.

104 The Securtiy Council has for example restored to military enforcement to provide humanitarian assistance to populations in need 1992 in relation to Bosnia-Herzegovina UN SC Resolution 781(1992), operative para 1 and in relation to Somail with UN SC Resolution, operative para 10; see AKANDE/GILLARD, Oxford Guidance, p. 48.

105 The armed intervention is also often carried out with a political agenda, see in this respect, RYNIKER, p. 529 f.

106 Military interventions are initiated for various of reasons, including political and national interests, see on this illustrative explanation in BARRY /JEFFERYS, p. 11.

107 Where there is political interest, help may be offered not only because of need, but also because of particular political convictions, or belongs to a 'friendly' group, or because the place of the fighting lies in a strategically important place. People who are not in one of these favored categories could be left out, see on this BARRY /JEFFERYS, p. 11.

military force into humanitarian action can therefore compromise humanitarian principles and make it harder for humanitarian actors to proclaim their neutrality, impartiality and independence.[108] Thus, since involvement of military enforcement can influence the perception of relief, the application of military force may not necessarily prevent the risk that humanitarian actions being denied and targeted, but may actually increase such risks.[109] This was, for example, the case in the humanitarian intervention in Somalia in 1992, where the UN Security Council authorised the intervention in Somalia and the use of military force to restore peace and create a safe environment for the provision of humanitarian relief based on Chapter VII of the UN Charter.[110] However, despite the presence of military forces, aid convoys continued to be attacked and the close association of the humanitarian agencies with the military force led to local hostilities.[111]

Against that background, it is questionable as to how effective humanitarian intervention can be as a remedy for situations of arbitrary withholding of consent. Since the application of military enforcement has the potential to influence the perception of relief actions, humanitarian intervention entails also a risk for the genuine protection of relief actions.[112] Military intervention

108 Barry /Jefferys, p. 12.

109 Steering Committee for Humanitarian response (SCHR) stated in its position paper of 2001: "there is a risk that too close a relationship between the peacekeeping mission and the humanitarian operation implicates humanitarians in political action to which elements of the local population are opposed, thereby putting them at risk of retaliation." See SCHR, Draft Position Paper on 'Humanitarian–Military Relations', Geneva January 2001 (internal document).

110 The peacekeeping mission UNOSOM was appointed by the UN with the Security Council Resolution 751 (1992) in order to monitor the ceasefire and assist the humanitarian relief efforts. When the relief convoys came repeatedly under attack, the United States offered to lead an intervention force, which was accepted by the UN Security Council with Resolution 794 (1992), that authorised the use of military force "to establish as soon as possible a secure environment for humanitarian relief operations in Somalia" under Chapter VII of the UN Charter. Subsequently, operations of UNOSOM were suspended, and the military intervention of the multinational force United Task Force (UNITAF) was appointed. Since the UNITAF mission did not succeed in establishing a secure environment in one year, UNITAF was replaced by the mission UNOSOM II, which was established by the Security Council in Resolution 814 (1993). The new mandate also provided UNOSOM II enforcement powers under Chapter VII of the UN Charter to establish a secure environment for the provision of relief. Further, UNOSOM II also had the mandate to assist the Somalian government in rebuilding their economic, political and social life. After failure on various levels, the mission was completed on March 28, 1995; see (instead of many) Mayall, p. 110 ff.

111 Barry /Jefferys, p. 12.

112 Ryniker, p. 531 f.

has therefore to be considered with particular restraint in the context of relief actions.[113] But it can be agreed, as the ICRC stated in its position paper to humanitarian intervention, there "where violations are very serious, and prevent humanitarian action, the problem exceeds the bounds of international humanitarian law and can no longer be dealt with by means of humanitarian action" and armed intervention may in such extreme situations become unavoidable.[114] However, where humanitarian intervention is applied as a last resort in order to enable the provision of relief actions, it is important to ensure that the intervention does not further endanger the safety of the humanitarian actors. Therefore, the neutrality and independence of the humanitarian actors must be particularly apparent and military force should not be engaged in the direct delivery of humanitarian assistance.[115] The ICRC underlines this aspect also in its position paper by stating that the concerned humanitarian organisations must retain their freedom of decision and action. It requires further that the external appearance must be such that "[b]oth the parties to the conflict and those who suffer its consequences must be able to discern a clear distinction between humanitarian and military entities" and that "[a]ny blurring of that distinction must be avoided."[116]

2.1.4.2 *Responsibility to Protect as a Ground for Non-military Interference?*

The doctrine of 'Responsibility to Protect' (in short: R2P) was developed as an alternative to the concept of humanitarian intervention and shall in contrast to humanitarian intervention also include non-military interferences.[117] It is therefore questionable whether R2P could serve non-belligerent States as a legal ground in situations of arbitrary withholding of consent to relief

113 Even more than it is already required in the view of the sovereignty of the concerned State. Oxfam has, for example, stated that it would not support armed intervention unless there was no other way to prevent widespread loss of life and once peaceful methods of resolution are exhausted; protection by the controlling authorities has demonstrably failed; when there is adherence to the norms of IHL; further when there is proportionality to the protection needs of the people at risk; and when there is accountability to the UN; see BARRY /JEFFERYS, p. 9.

114 RYNIKER, p. 531.

115 In the past, there have been only limited occasions where the military was directly charged with the delivery of humanitarian assistance in conflict-related emergencies like for example in Iraq in April 1999 or during the Kosovo crisis in April 1999; see BARRY / JEFFERYS, p. 13.

116 RYNIKER, p. 532.

117 For an in-depth analysis see CHESTERMAN SIMON, 'R2P and Humanitarian Intervention: From Apology to Utopia and Back Again' in: Robin Geiss/Nils Melzer (eds.), The Oxford Handbook on the International Law of Global Security, Oxford 2018.

operations for providing humanitarian relief against the will of the concerned State and without military enforcement.

The idea of R2P was articulated the first time in 2001 by the International Commission on Intervention and State Sovereignty. In 2005, the concept was endorsed by the United Nations in the 'World Summit Outcome Document' where representatives of the then 191 members States of the UN agreed to it. According to R2P, all States have the responsibility to protect their populations from grave international crimes such as genocide, war crimes, ethnic cleansing or crimes against humanity and are supported in this by the international community. Where the concerned State is unable or unwilling to protect its people against such grave human rights breaches, the responsibility to protect those civilians shall shift to the international community. Thus, R2P aims to provide a legal basis to intervene in the territory of another State to prevent or stop human rights violations of the civilians through grave international crimes.

From 2005 on, certain progresses have been made regarding R2P. In 2006, for example, the Security Council unanimously adopted the Resolution 1674 (2006) on 'the Protection of Civilians in Armed Conflict', in which it expressly referred to the R2P.[118] In the Security Council Resolution 1706 (2006) for sending of UN peacekeeping troops to Darfur, the Security Council made a reference to Resolution 1674 (2006) in the Summit Outcome Document.[119] Further, the UN Secretary-General has appointed a Special Adviser on the Prevention of Genocide and a Special Adviser to the Secretary-General with a focus on the R2P.[120] However, despite apparently growing consensus on the existence of a responsibility for the international community to act to protect civilians, there still seems to be a lack of consensus within the international community when it comes to the actual application of the concept of R2P. For example in 2007, a Security Council resolution on the situation in Burma was vetoed by China and Russia arguing that the situation in that country "did not pose a threat to peace and security in the region, and that the internal affairs of the state did not have a place within the Security Council."[121] UN Security Council Resolution 1769 (2007), which authorised the deployment of a UN-AU force in Darfur did not

118 UN SC Resolution 1674 (2006), preambular para. 4: "Reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."

119 UN SC Resolution 1706 (2006), preambular para. 1.

120 UN SC, Letter dated 31 August 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/721, 7 December 2007.

121 See UN Meetings Coverage and Press Releases, 'Security Council fails to adopt draft resolution on Myanmar, owing to negative votes by China, Russian Federation', 12 January

refer to the R2P or to Resolution 1674 on Protection of Civilians.[122] And also during the UN General Assembly's Fifth Committee bi-annual budget debate in 2008, the Committee declined funding the office of the new Special Adviser on R2P. It was argued, that the R2P had never been agreed to 'as a norm'.[123]

There was a glimmer of hope when, in March 2011, the Security Council adopted Resolution 1973 (2011) on Libya, the first military intervention to protect the civilian population with reference to the R2P. However, after Libya, there were no similar responses of intervention on the basis of R2P by the Security Council or the international community in general in respect to other, similar crises like for example in Darfur, Somalia, Burma or the Democratic Republic of Congo. And even though the international community has agreed in several situations on the fact that the conflict in Syria has taken an unacceptable toll on its affected civilians, there have been until today no interferences in reference to R2P. It is therefore to conclude, that the doctrine of R2P did not yet crystallise into a consistent and recognised legal ground for interferences in another State.[124] Further, it should also be noted that R2P's aim is to prevent grave international crimes. However, situations of arbitrary withholding of consent can, as mentioned before, also be given when there are no grave international crimes committed. R2P has therefore a different scope than the prohibition of arbitrary withholding consent. Thus, even if R2P would be a consistent and internationally recognised legal ground for interferences, it would be applicable only in particular situations of arbitrary withholding of consent, namely where the withholding constitutes a grave international crime.[125]

In view of the unstable practice coupled with the limited scope for potential application, the present book doubts that R2P can effectively serve in practice as a valid ground for non-belligerent States to provide relief in situations of arbitrary withholding of consent as a form as a non-military interference in the territory of the concerned State.[126]

2017, available at https://www.un.org/press/en/2007/sc8939.doc.htm (last visited 31 August 2023).

122 UN SC Resolution 1769 (2007), 'on establishment of AU/UN Hybrid Operation in Darfur (UNAMID)', UN Doc. S/RES/1769, 31 July 2007.

123 See on the overall topic, International Coalition for the Responsibility to Protect, An Introduction to the Responsibility to Protect, see on the website, available at https://www.globalr2p.org/what-is-r2p/ (last visited 31 August 2023).

124 See on this the interview with Peter Maurer, former president of the ICRC, in International Review of the Red Cross, p. 880 f.

125 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 10.

126 HAIDER, p. 6.

2.2 *Measures Taken Through International Organisations*

2.2.1 Duty to Cooperate

An act with the goal to ensure respect of international law is more effective if it is not only taken up by one or several States, but enjoys the political support of many States. Cooperation of States through international organisations such as the UN are therefore important and frequently used tools by States in order to apply joint measures.[127] A duty to cooperate with the UN is explicitly recognised in Article 89 of AP I, which provides that in situations of serious violations of the Conventions or of that Protocol, States shall act "jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter."[128] According to Article 1(3) of the Charter of the UN[129], promoting and encouraging respect for human rights and fundamental freedoms is a vital purpose of the UN.[130]

Although the duty to cooperate is mentioned in Article 89 AP I in the context of international armed conflicts, it is not limited to these situations, as similar formulations can be found in other international treaties. For example, Draft Article 4(1) on State responsibility stipulates that "States shall cooperate to bring to an end through lawful means any serious breach" of an obligation arising under a peremptory norm of international law.[131] A duty for States to cooperate with other States within the UN can be further found in Article 56 of the UN Charter which states that cooperation of States is required for the achievement of universal respect of human rights and fundamental freedom.[132] Accordingly, the duty to cooperate can be understood as a general duty that can be invoked in all situations, including non-international armed conflicts, when there is a serious breach of law, which is undoubtedly the case in the arbitrary withholding of consent to humanitarian relief.

UN bodies which enable States to apply joint measures are the Security Council (2.2.2) and the General Assembly (2.2.3). Further, human rights bodies such as the Human Rights Council (2.2.4) and Human Rights Treaty Bodies

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127 Also, regional organisations like for example the EU play an important role for joint enforcement of IHL through States. Instruments within the EU are for example political dialogues with non-EU States or public statements through which the EU condemns particular situations or acts, application of restrictive measures and sanctions which are mentioned in the EU guidelines on the promotion of compliance with international humanitarian law, OJ C 303, 15.12.2009, p. 12.

128 PALWANKAR, online Article.

129 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

130 OHCHR, p. 93.

131 SASSÒLI, State Responsibility, p. 428 ff.

132 ICRC Commentary on AP I, Article 89, para. 3595.

(2.2.5) enable the enforcement of law. In this regard, it should be noted that UN human rights mechanisms play an important role in the enforcement of IHL. Where human rights bodies report or are otherwise considering situations of armed conflict, they also take violations of IHL norms into account, but under the guise of human rights violations.[133] The use of IHRL mechanisms to enhance and enforce IHL is generally justified by the lack of enforcement mechanisms for the IHL (which will be discussed in detail later).[134] It is also argued that since IHL, and in particular humanitarian norms, are instruments for ensuring IHRL provisions, it should be possible to use the enforcement mechanism of IHRL to demand compliance with IHL obligations.[135]

2.2.2 UN Security Council

2.2.2.1 *Resolutions in General*

The Security Council has according to Article 25 of the UN Charter the possibility to adopt binding resolutions to the Member States, particularly on the basis of Chapter VII of the Charter as a response to threats and breaches of peace.[136]

By having the primary responsibility for the maintenance of international peace and security (under Articles 24 and 39 of the UN Charter), the Security Council must convene particularly at a time when there are grave breaches of IHRL and IHL. In this respect, the Security Council has called on several occasions upon the parties to non-international armed conflicts, States as well as non-State armed groups, to respect their obligations under IHL and IHRL, and condemned existing violations of law,[137] imposed sanctions on high-level

133 SIVAKUMARAN, Non-International Armed Conflict, p. 467; see also OBERLEITNER, p. 934; ICRC Study on Customary IHL, Rule 149; and CLAPHAM, Rights and Responsibilities, p. 29.

134 Using IHRL enforcement mechanisms to require compliance with IHL is for example for the individual complaint procedures the African Charta on Human Rights and Peoples' Rights even explicitly provided in Article 60 and 61 that the Commission "shall draw inspiration from international law on human and peoples' rights" and "shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions." Based on that the Commission considers complaints also in view of other international regulations, which includes according to its practice IHL, see on this KÄLIN/KÜNZLI, p. 223; see also ZIMMERMANN /BÄUMLER, p. 48, with further references.

135 See on this STOFFELS, p. 520.

136 Article 25 of the UN Charter: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." See on the overall topic, SIVAKUMARAN, Non-International Armed Conflict, p. 466.

137 For example, UN SC Resolutions on Libya: 950 (1994); Burundi: 1012 (1995); Sierra Leone: 1231 (1999); see SIVAKUMARAN, Non-International Armed Conflict, p. 465.

officials,[138] individuals and entities involved in the fighting.[139] The Security Council has also on various occasions condemned denial to humanitarian assistance during armed conflicts. The Council has done so in thematic resolutions as well as in response to a specific conflict situation, calling on States and non-State armed groups to allow and facilitate immediate and unimpeded humanitarian access to affected civilians.[140]

In the vast majority of resolutions in which the Security Council has addressed the denial of relief in response to a particular armed situation, it has called upon the parties to the conflict to put an end to this practice, with the intention of exhorting them to recognise the need for relief and to allow for the delivery of humanitarian relief.[141] The focus was to create security conditions and circumstances which enable the delivery of assistance.[142]

Where exhortation alone is ineffective, the Security Council also has the option of adopting enforcement measures in the resolution. For example, it can back up its call for access to assistance with the imposition or threat of sanctions under Chapter VII of the UN Charter.[143] As a last resort, where peaceful means have been exhausted, the Council can also allow the use of military force to ensure the delivery humanitarian.[144] To date, the Security Council has only on a small number of occasions adopted enforcement measures with regard to humanitarian relief operations.[145] The Security Council has imposed targeted sanctions on armed groups and members of it for obstructing humanitarian activities or access to humanitarian assistance, for example

138 This has been, for example, the case in respect of senior UNITA Officials in UN SC Resolutions 1127 (1997) and 1135 (1997); or a commander of the Sudan Liberation Army (SLA) in UN SC Resolutions 1591 (2005) and 1672 (2006); or the leadership of the Armed Forces Revolutionary Council in the Sierra Leonean armed conflict in UN SC Resolution 1171 (1998).

139 UN SC Resolution 1807 (2008), on the overall topic, see SIVAKUMARAN, Non-International Armed Conflict, p. 466.

140 For example, in UN SC Resolution 2002 (2011), the Security Council demanded with regard to humanitarian access in Somalia "that all parties ensure full, safe and unhindered access for the timely delivery of humanitarian aid to persons in need of assistance across Somalia", see para. 5. Other examples are found in UN SC Resolution 1973 (2011), para. 3, on humanitarian access in Libya or Res. 1935 (2010), para. 10, on Darfur; on the overall topic see SFDFA, p. 13; see also VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 23.

141 AKANDE/GILLARD, Oxford Guidance, p. 18 with further references.

142 AKANDE/GILLARD Oxford Guidance, p. 18.

143 GILLARD, p. 34.

144 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 23.

145 AKANDE/GILLARD Oxford Guidance, p. 18 referring to different resolutions, e.g. in relation to Somalia, UN SC Resolution 794 (1992).

to Al-Shabaab in Somalia[146] or to Habbi-Soussou, an anti-Ablka commander in the Central African Republic.[147] The Security Council has also resorted to military enforcement to ensure the delivery of humanitarian assistance in a very limited number of cases of humanitarian intervention, for example in 1992 in relation to relief operations during the conflicts in Bosnia-Herzegovina and Somalia.[148] Finally, the Security Council can also mandate the provision of assistance (without military enforcement) and authorise specific relief organisations to carry it out.[149]

Although the Security Council has frequently addressed obstructions to humanitarian operations in its resolutions, up until 2014 it never required parties to the conflict to consent to such operations.[150] For the first time, the Security Council adopted such a proactive approach in its Resolution 2139 (2014) in response to the humanitarian crisis in Syria by making a binding demand to the relevant conflict parties to consent to humanitarian relief.[151] In the Resolution 2165 (2014) the Security Council went even further and decided that relief can be provided by the United Nations humanitarian agencies and their implementing partners without consent of the concerned conflict parties. Since then, no similar resolutions were adopted by the Security Council, and these resolutions are considered up until today as revolutionary.[152] They will be discussed in depth in the following (see 2.2.2.2 and 2.2.2.3).

146 Al-Shabab was listed by the Security Council for food aid diversion and kidnapping aid workers, Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1853 (2008); see also the UN SC narrative summaries of reasons for listing on the website, available at https://www.un.org/securitycouncil/sanctions/751/materials/summaries/entity/al-shabaab (last visited 31 August 2023).

147 The commander was principally listed by the Security Council attacks against humanitarian workers and looting of supplies and equipment, SC Resolution 762 (2014), Annexes 59–61; On the overall topic, see AKANDE/GILLARD, Oxford Guidance, p. 50, referring in relation to Somalia to UN SC Resolution 1844 (2008), para. 8(c); in relation to the Democratic Republic of the Congo, UN SC Resolution 1857 (2008), para. 4(f); in relation to Central African Republic, UN SC Resolution 2134 (2014), para. 37(e); see also the UN SC Narrative Summaries of reasons for listing, available at https://www.un.org/securitycouncil/sanctions/2127/materials/summaries/individual/habib-soussou, (last visited 31 August 2023) see on the overall topic, AKANDE/GILLARD Oxford Guidance, p. 50.

148 AKANDE/GILLARD Oxford Guidance, p. 50 referring to UN SC Resolution 770 (1992).

149 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 23.

150 AKANDE/GILLARD, Oxford Guidance, p. 18.

151 UN SC Resolution 2165 (2014), operative para 2; see also AKANDE/GILLARD, Oxford Guidance, p. 18.

152 Particularly after Resolution 2165 (2014), the Security Council did not adopt similar resolutions with authorisation to provide relief without consent for other situations of humanitarian crisis and did not confirm it as a new approach of the Council for situations

Finally, another landmark resolution on the obstruction of relief that deserves special mention and a closer look is Resolution 2417 (2018). In this resolution, the Security Council, for the first time, addressed the issue of hunger and food insecurity in situations of armed conflict in a thematic resolution, specifically condemning the unlawful denial of humanitarian access and the starvation of civilians as a tactic of warfare (see 2.2.2.4).

2.2.2.2 *Resolution 2139 (2014): Obligation to Provide Consent*

In response to the humanitarian crisis caused by the armed conflict in Syria and the continued denial of humanitarian access, particularly by the Syrian government to the north-eastern areas under the control of the Kurdish-led force, the Security Council unanimously adopted a more proactive approach than usual on 22 February 2014 with Resolution 2139 (2014): While "condemning all cases of denial of humanitarian access" and recalling to the parties "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"[153] the Security Council made a binding call to the conflict parties in Syria and other relevant parties in the context of the conflict to "allow the delivery of humanitarian assistance," particularly that they "allow rapid, safe and unhindered access for UN humanitarian agencies and their implementing partners, including across conflict lines and across borders, in order to ensure that humanitarian assistance reaches people in need through the most direct routes."[154] The Council further stressed "the need to end impunity for violations of international humanitarian law and violations and abuses of human rights," and reaffirmed that "those who have committed or are otherwise responsible for such violations and abuses in Syria must be brought to justice."[155] However, the resolution only expressed the intention to take action in case of non-compliance, but refrained from mentioning any concrete enforcement mechanism or sanctions, in particular to avoid a veto by Russia, a permanent member and Syrian ally.[156] The UN Secretary-General was requested to report to the Security

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where relief is withheld arbitrarily. For this, see Akande/Gillard, Oxford Guidance, p. 18; see also Barber, EJIL Talk Blog.

153 UN SC Resolution 2139 (2014), considerations.

154 UN SC Resolution 2139 (2014), paras 5 and 6.

155 UN SC Resolution 2139 (2014), para. 13.

156 The Russian permanent representative to the Security Council after the vote particularly underscored that there is no "automaticity" according to the resolution to undertaking sanctions in the event of non-compliance, see on this the online article on the website

Council on the implementation of this resolution 30 days after its adoption and every 30 days thereafter.[157]

2.2.2.3 *Resolution 2165 (2014) including Partial Renewal until Failure to Do So in 2023: Provision of Relief without Requirement of Consent*

The UN Secretary-General reported in May and June 2014 that the requirements of Resolution 2139 (2014) had not been met by the parties to the Syrian conflict, and that arbitrary and unjustified withholding of consent to relief operations continued. He further stated that millions of people in need are in areas that are difficult or impossible for humanitarian actors to reach from within Syria, including in particular north-eastern Syria, which is mainly under the control of Kurdish forces.[158] Based on these findings, the Security Council adopted a binding decision in Resolution 2165 (2014), authorising UN humanitarian agencies and their implementing humanitarian partners to provide assistance through four designated border-crossings from Turkey, Iraq, and Jordan "in order to ensure that assistance, including medical and surgical supplies, reached people in need throughout Syria through the most direct routes."[159] Although the resolution stipulated that the UN had to inform the Syrian authorities each time before delivering any assistance "in order to confirm the humanitarian nature of these relief consignments,"[160] it represented a breakthrough in the existing concept of humanitarian relief, as it authorised humanitarian organisations to deliver the necessary relief directly through the aforementioned border crossings without requiring the consent and authorisation of the Syrian authorities.[161] Again, the resolution affirmed the intention to take "further action" in the event of non-compliance, without mentioning

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of Atlantic Council, available at https://www.atlanticcouncil.org/blogs/menasource/syria-resolution-2139-2014/ (last visited 31 August 2023).

157 UN SC Resolution 2139 (2014), para. 17.

158 UN Secretary-General's reports 2014/365 and 2014/427, considerations.

159 Namely border crossings at Bab al-Salam, Bab al-Hawa, Al Yarubiyah and Al-Ramth, S/Res/2165 (2014), para 2, see also New Article, Aron Lund, The New Humanitarian, 'Diplomats battle over key Syria aid resolution', available at https://www.thenewhumanitarian.org/analysis/2019/12/16/Syria-UN-United-Nations-Security-Council-aid-Russia-Turkey; (last visited 31 August 2023) for more information see also BARBER, EJIL Talk Blog and also ZIMMERMANN, p. 3 ff.

160 UN SC Resolution 2165 (2014), paras 2 and 3. Notification was provided 48 hours in advance of "each shipment, including its contents, its destination and the number of beneficiaries expected to be reaches with the respective relief," see on this the Report of the Secretary General on Implementation of the Security Council resolutions 2139 (2014), 2165 (2014), 2258 (2015), 2332 (2016) and 2393 (2017), paras 29 and 36.

161 See also AKANDE/GILLARD, Oxford Guidance, p. 18.

any coercive measures.[162] The representative of the Russian Federation, however, stressed that the text did not contain a trigger for the use of force in case of non-compliance and assured that the text reflected respect for Syrian sovereignty. The resolution was subsequently adopted unanimously.[163]

Resolution 2165 (2014) was renewed yearly in the following years up until 2020. In January 2020, however, Russia and China vetoed the Security Council's draft for the renewal of Resolution 2165 (2014). The reason for this was – without going into much detail[164] – that in October 2019, Turkey invaded Kurdish-controlled areas in north-eastern Syria and established a so-called "safe zone" along the border with Turkey, which was negotiated between Russia, Turkey, and the Syrian government. In the aftermath of this event, Turkey and Russia were more interested in ensuring that aid to north-eastern Syria was delivered through Turkey's new "safe zone," where Turkey could control the delivery of relief to Kurdish-held areas, and wanted to eliminate border crossings by States other than Turkey.[165] Consequently, in January 2020, only the two former border crossings from Turkey into north-western Syria (Bab al-Hawa and Bab al-Salameh) were approved under Security Council Resolution 2504 (2020). The border crossings from Jordan (Al Ramtha) into southern Syria and from Iraq (Al Yarubiyah) into north-eastern Syria, as provided for in Resolution 2165 (2014), were no longer included, leaving millions of people in Syria without access to international humanitarian assistance. The updated Resolution was then set to expire after six months (instead of one year as before) on 10 July 2020.[166]

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162 UN SC Resolution 2165 (2014), para. 11.

163 Meetings Coverage Security Council, 'With Millions of Syrians in Need, Security Council Adopts Resolution 2165 (2014) Directing Relief Delivery through More Border Crossings, across Conflict Lines,' SC/11473 from 14 July 2014; available at https://www.un.org/press/en/2014/sc11473.doc.htm (last visited 31 August 2023).

164 For more background and details on the invasion and the Syrian conflict and the "safe zone" see for example: The Guardian, 'Turkey's 'safe zone' in northern Syria unsafe for civilians, says report,' 27 November 2019, available at https://www.theguardian.com/world/2019/nov/27/turkey-safe-zone-northern-syria-unsafe-civilians-human-rights-watch-report; BBC, Turkey-Syria offensive: What are 'safe zones' and do they work?, 2 November 2019, available at https://www.bbc.com/news/world-middle-east-50101688; Sinem AdarGerman Institute for International and Security Affairs, 'Repatriation to Turkey's "Safe Zone" in Northeast Syria, Ankara's Goals and European Concerns,' 1 January 2020, available at https://www.swp-berlin.org/en/publication/repatriation-to-turkeys-safe-zone-in-northeast-syria/ (all last visited 31 August 2023).

165 The authorisation in the Security Council Resolution 2165 (2014) enabled the provision of humanitarian assistance to more than four million Syrians, more hereto see BARBER, EJIL Talk Blog.

166 UN SC Resolution 2504 (2020), para. 3; on the whole, see also BARBER, EJIL Talk Blog.

In his report of 14 May 2020, UN Secretary-General António Guterres called for the Bab al-Hawa and Bab al-Salameh border crossings to be renewed for a full year in July 2020, in light of the humanitarian and economic crisis in Syria, and also in light of the ongoing global COVID-19 pandemic situation.[167] Germany and Belgium drafted a Security Council resolution that would not only have extended the use of Bab al-Hawa and Bab al-Salameh for 12 months, but would also have reactivated Yarubiyah as a trial for a period of six months, a critical border crossing for relief for 1.4 million people, including 500,000 children, in north-west Syria.[168] However, the adoption of the draft was overruled by the veto of China and Russia. With Resolution 2533 (2020) a compromise proposal was finally adopted, where China and Russia abstained from voting, and which allowed delivery of relief only through the borders crossing from Turkey Bab al-Hawa Border to north-west Syria for one year.[169] Despite this considerable restriction of the original mandate, the Security Council continued to have difficulties in the following years in renewing the (one remaining) authorisation for cross-border relief deliveries in Syria. Numerous drafts and diplomatic compromises were required each time to reach an agreement. China and Russia have consistently argued that cross-border relief deliveries without government consent are exceptional measures that undermine Syria's sovereignty and should be replaced as soon as possible by crossline aid deliveries through Syrian government-controlled areas.[170]

On 11 July 2023, the Council ultimately failed to adopt a reauthorisation. The draft submitted by the co-penholders (Brazil and Switzerland), which provided for a nine-month extension of the Bab al-Hawa crossing,[171] was vetoed by Russia. Russia's alternative draft, which proposed a six-month extension of the crossing,[172] received only two votes in favour.[173] A major reason for this

167 Report of the Secretary-General to the Security Council, Review of United Nations humanitarian crossline and cross-border operations, UN Doc. S/2020/401, 14 May 2020.

168 See on the whole, Analysis in the New Humanitarian: 'Russia hold key to UN Syria aid operation; Those most vulnerable are first affected and worst affected', 1 July 2020; and Colum Lynch/Robbie Gramer, Report in Foreign Policy, 'Russia, with an eye on the Syrian prize, blocks humanitarian aid,' 10 July 2020.

169 UN SC Resolution 2533 (2020), paras 1 ff.

170 Security Council Report Organisation, 'In Hindsight: The Demise of the Syria Cross-border Aid Mechanism' in August 2023 Monthly Forecast, posted 31 July 2023, available at https://www.securitycouncilreport.org/monthly-forecast/2023-08/in-hindsight-the-demise-of-the-syria-cross-border-aid-mechanism.php (last visited 31 August 2023).

171 UN SC, Brazil and Switzerland: draft resolution S/2023/506 of 11 July 2023, para. 2.

172 UN SC, Russian Federation: draft resolution S/2023/507 of July 2023, para. 2.

173 United Nations, Meetings Coverage and Press Releases, 'Security Council Rejects Two Draft Resolutions Aimed at Renewing Cross-Border Humanitarian Operations in Syria's

failure was undeniably the geopolitical events in 2022 and 2023, including the war in Ukraine and related events, which further exacerbated the tensions surrounding the negotiations and made it impossible for the parties to reach an agreement.[174]

Resolution 2165 (2014), and the process of its renewal and eventual failure, demonstrated once again that the Security Council relies on the goodwill of permanent members to pass politically contentious resolutions, and that political tensions among members can limit the Security Council's ability to act. In addition, not all States are equally politically supportive of the possibility of waiving the requirement of consent for the provision of humanitarian relief. State sovereignty is held in very high regard, and the potential to undermine it through the provision of humanitarian relief without the consent of the affected State is viewed critically. The author of this book therefore questions whether, after this experience, the Security Council will ever again adopt a resolution similar to 2165 (2014) in another situation, or whether this will rather remain a one-off incident that showed that not all States are on the same page in this regard, at least not in the long term.

2.2.2.4 *Resolution 2417 (2018): Condemning Unlawful Denial of Humanitarian Access and the Starvation of Civilians in a Thematic Resolution*

With Resolution 2417 (2018), the Security Council adopted on 24 May 2018 its first thematic resolution on hunger and food insecurity in armed conflicts. Resolution 2417 (2018) was adopted unanimously and is part of the Security Council's broader action in the area of 'protection of civilians', in which the Council systematically addresses a range of topics relevant to the effective protection of civilians in situations of armed conflict.[175]

North-West', SC/15348 of 11 July 2023, available at https://press.un.org/en/ 2023/sc15348.doc.htm (last visited 31 August 2023).

174 Security Council Report Organisation, 'In Hindsight: The Demise of the Syria Cross-border Aid Mechanism' in August 2023 Monthly Forecast, posted 31 July 2023, available at https://www.securitycouncilreport.org/monthly-forecast/2023-08/in-hindsight-the-demise-of-the-syria-cross-border-aid-mechanism.php (last visited 31 August 2023).

175 United Nations, Meetings Coverage and Press Releases, 'Adopting Resolution 2417 (2018), Security Council Strongly Condemns Starving of Civilians, Unlawfully Denying Humanitarian Access as Warefare Tactics', SC/13354 of 24 May 2018, available at https://press.un.org/en/2018/sc13354.doc.htm (last visited 31 August 2023); for an overall look on the work of the Security Council in the area 'protection of civilians' see 'aide memoire', annexed to Statement by the President of the Security Council, UN Doc. S/PRST/2018/18, 21 September 2018; on the whole see also Zappalà, p. 885.

Even though it is well known that civilians suffer from food shortages during armed conflicts, not least because starvation is often used as a method of warfare,[176] the Security Council has been reluctant to address this subject in a general and structured manner in a thematic resolution. The main reason for this was that some Member States felt that the link between hunger and conflict was too broad and that there were too many causes of malnutrition and famine in armed conflicts that went beyond the conflict situation itself. On this basis, it was argued that since the Security Council's mandate is to deal with the maintenance of peace and security in specific situations, the Council's interventions should be limited to aspects that can be directly linked to peace and security. There were also concerns about whether the issue of hunger could be addressed by the Security Council at all, given that it is primarily a development issue and would interfere with the responsibilities of other UN bodies, such as the General Assembly or the Economic and Social Council (ECOSOC). In addition, there were some general 'assumptions', such as the idea that hunger is almost inevitable in armed conflict and that there is no general and unconditional prohibition of starvation of civilians in armed conflict under IHL (but only as a method of warfare). The Council has therefore so far limited its response to specific conflict situations, where the factors behind food insecurity and famine could be addressed in a context-based manner.[177]

However, the issue of hunger and food insecurity in armed conflict has received renewed attention due to the suffering of civilians in armed conflicts such as in South Sudan, Syria, Yemen and north-east Nigeria. In February 2017, UN Secretary-General António Guterres called on Member States to act in the face of the threat of famine linked to armed violence and armed conflict in these countries.[178] Several months of discussions, negotiations and preparatory work followed before the scepticism and reluctance within the Security

176 See on this topic, for example, A. de Waal, 'Armed Conflict and the Challenge of Hunger: Is an End in Sight?', IFPRI Global hunger index 2015, at 22–29, available online at https://www.ifpri.org/publication/armed-conflict-and-challenge-hunger-end-sight (last visited 31 August 2023).

177 For an overview of the discussions and concerns on this issue in the Security Council, see ZAPPALÀ, pp. 884 ff.

178 UN Secretary-General, Press Conference, see https://www.un.org/sg/en/content/sg/press-encounter/2017-02-22/full-transcript-of-secretary-generals-joint-press-conference-humanitarian-crises-nigeria-somalia-south-sudan-and-yemen (last visited 31 August 2020); also https://www.nytimes.com/ 2017/02/22/world/africa/why-20-million-people-are-on-brink-of-famine-in-a-world-of-plenty.html (last visited 31 August 2020); on the overall topic, see ZAPPALÀ, pp. 882 and 884 ff.

Council could be overcome.[179] With Resolution 2417 (2018), the Security Council not only recognised the undeniable link between food insecurity and armed conflict, but also, in the context of its responsibility for the maintenance of international peace and security, its duty to address conflict-related food insecurity, famine and hunger in a general framework that would help strengthen the international community's response to such situations.[180]

Regarding the link between armed conflict and food insecurity and the threat of famine, the Resolution emphasises in particular the importance of the unimpeded delivery of humanitarian assistance. For example, in preambular paragraph 3, the Council recognises that ongoing armed conflicts often hinder effective humanitarian action, "and are therefore a major cause of the current risk of famine." In this respect, the Resolution recalls in its preambular paragraph 15 the obligations of the conflict parties under international humanitarian law to meet the humanitarian needs of the civilian population by allowing and facilitating the rapid and unimpeded passage of humanitarian

179 Even though only a few months after that call of the Secretary General, the Security Council Members held a meeting (a so called Arria formula meeting) and spoke about the seriousness of the threat and the interplay between conflict and hunger as well as the need for urgent action by the international community, the Council was unable to agree on any resolution. On 9 August 2017, the Council however adopted a Presidential Statement (S/PRST/2017/14) which laid out aform of general principles and recognitions regarding hunger and food insecurity in conflicts, although it was limited to the mentioned four countries. The Council reaffirmed therein that the ongoing conflicts are themselves a major cause of famine and underlined the obligations of the conflict parties to respect and protect civilians. The Council also reminded the conflict parties of their obligation to comply with IHL. The Council particularly called out in this regard that 'certain parties have failed to ensure unfettered and sustained access for deliveries of vital food assistance, as well as other forms of humanitarian aid' and asked them to allow 'safe, timely and unhindered access for humanitarian assistance to all areas and to facilitate access for essential imports of food, fuel and medical supplies'. Throughout 2017, the Netherlands and Switzerland also organised several workshops and dialogues among experts, which highlighted the issue. And despite some divergence of opinions within the Security Council, Members of the Council continued discussion on the topic and reiterated the need for Council engagement in briefings in October 2017 and in March 2018. All the discussions and prepatory works have made an important contribution to provide a solid ground for the adoption of the resolution; see https://www.un.org/webcast/pdfs/170616pm-sc-arria-famine.pdf and https://www.securitycouncilreport.org/whatsinblue/2017/06/arria-formula-meeting-on-the-risk-of-famine-in-conflict-affected-areas.php (last visited 31 August 2023) and Statement by the President of the Security Council, UN Doc. S/PRST/2017/14, 9 August 2017; for more information on the organised expert meetings of Netherland and Switzerland, see the report itself, on the overall topic, see Zappalà, p. 882–884.

180 Zappalà, p. 887; see also preambule paras 3, 7 and 8 of the Resolution 2417 (2018).

assistance, and further emphasises in its preambular paragraph 18 the obligation to respect and protect humanitarian personnel. The operative part of the Resolution reflects these considerations. For example, in operative paragraph 4, the Council calls upon "all to comply with their obligations under international humanitarian law," and underlines the importance of "safe and unimpeded access of humanitarian personnel to civilians in armed conflicts." It further calls also on neighbouring States, "to cooperate fully with the United Nations Humanitarian Coordinator and United Nations agencies in providing such access" and acknowledges the important role which neighbouring States play in the provision of humanitarian relief.[181] Paragraph 4 further invites all States and the Secretary-General to bring "information regarding the unlawful denial of such access in violation of international law" to the attention of the Council "where such denial may constitute a threat to international peace and security." In this regard, the Council "expresses its willingness to consider such information and, when necessary, to adopt appropriate steps."

The last provision of paragraph 4 constitutes an innovative approach to dealing with situations of unlawful denial of access for humanitarian personnel respectively situations of arbitrary withholding of consent to relief operations:[182] it encourages States and the Secretary-General to be proactive in informing the Security Council of such situations and provides an opportunity for the Council to act on the basis of such information. A general provision on reporting can also be found in operative paragraph 12, where the Council "requests the Secretary-General to report swiftly to the Council when the risk of the conflict-induced famine and widespread food insecurity in armed conflict contexts occurs and expresses its intention to give its full attention to such information." However, as Zappalà noted correctly in his article on Resolution 2417 (2018), "this is an extremely mild form of commitment for the future to do something without any automaticity. There is no guarantee that the Council will do anything. Moreover, the Council, irrespective of paragraph 4, already had such power."[183] Furthermore, according to paragraph 4, only information on unlawful denials that "constitute a threat to international peace and security" will be considered. Thus, the Council's willingness to act is limited to such cases, while it remains uncertain as to what kind of situations of unlawful

181 Zappalà, p. 895.

182 According to the view of the author of the present book, what is referred to in Resolution 2417 (2018) as unlawful denial of relief actions corresponds to what is understood in this book as cases of arbitrary withholding of consent to relief. The two expressions are therefore used here as synonyms.

183 Zappalà, p. 895.

denial of assistance might fall under these terms. It is questionable whether or not all denials of assistance that are to be considered unlawful (because they leave civilians in a humanitarian crisis without access to assistance) have the potential to threaten international peace and security. Despite these shortcomings, however, the provision in paragraph 4 sends a politically important signal about how unlawful denial of assistance is perceived, namely that it invokes the responsibility of the international community to act and to report, and that the Security Council is prepared to respond to such situations.[184]

The Resolution does not only leave the question open "if" the Council will effectively react in situations where consent to relief is arbitrarily withheld, but also "how" it might respond. In preambular paragraph 16, the Council recalls its intention to mandate, where appropriate, UN peacekeeping missions "to assist in creating conditions conducive to safe, timely and unimpeded humanitarian assistance." The Council does not, however, make any further commitment in this regard in the operative part, but with this recall, provides a reminder to actively consider such measures in situations where peacekeeping missions are mandated and there are impediments to assistance.[185] The Council has also expressed similar intention in other resolutions.[186] A possible reaction of the Council to arbitrary withholding of consent could be the adoption of sanctions. In operative paragraph 9, the Council "[r]ecalls that [it] has adopted and can consider to adopt sanction measures, where appropriate and in line with existing practice, that can be applied to individuals or entities obstructing the delivery of humanitarian assistance, or access to, or distribution of, humanitarian assistance," which also includes situations of unlawful denial of relief actions. As ZAPPALÀ also rightly points out here, this provision does not constitute a new possibility for the Council, it is again a power that the Council would have had even without Resolution 2417.[187] But the fact that it is stated is important from a political point of view and demonstrates

184 Similar conclusion by ZAPPALÀ, p. 895; Also in operative paragraph 6, the Council expresses its strong condemnation of "unlawful denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access for responses to conflict induced food insecurity in situations of armed conflict, which may constitute a violation of international humanitarian law." Zappalà noted hereto "One would be tempted to say that unlawful denial is per se a violation (otherwise, it would not be unlawful!)," see on the whole, ZAPPALÀ 6, p. 897.

185 See on this the argumentation of ZAPPALÀ, p. 891.

186 For example, in UN SC Resolutions 1894 (2009), para. 15. See also UN SC Resolutiongs 2000 (2011), para. 7; 1996 (2011), para. 3; 1990 (2011), para. 2; 1861(2009), para. 7; 1565 (2004), para. 5; 1270 (1999), para. 8.

187 ZAPPALÀ, p. 896.

the Council's willingness to act in situations of food insecurity during armed conflict, including in situations where consent to relief might be arbitrarily withheld.[188]

In operative paragraph 5 the Council further "[s]trongly condemns the use of starvation of civilians as a method of warfare" and recalls that it is "prohibited by international humanitarian law." Here again, the Council does not further elaborate on what the consequences might be at the international level for those who use starvation as a method of warfare, for example by deliberately and unlawfully obstructing humanitarian assistance.[189] Only in the preamble does the Resolution refer to the fact that starvation of civilians may amount to a war crime. It should be noted that the Resolution does not distinguish between starvation in international and non-international armed conflicts, while the Rome Statute has for a long time considered only the latter to be a war crime.[190] Given the circumstance that within the Council there are States (such as China, Russia and the United States) that have not ratified the Rome Statute, it is also understandable that the Council did not make any reference or distinction on the basis of the Rome Statute.[191]

With regard to the possible consequences of unlawful situations, the Resolution rather reiterates the responsibility of the international community. In operative paragraph 8, for example, the Council urges States "with influence over parties to armed conflict to remind them of their obligations under international humanitarian law." In doing so, the Council echoes the already existing obligation of States "to ensure respect" for IHL under Common Article 1 of the GCs[192] and emphasises the fact (which has already been mentioned in this book) that certain States may have particular influence over parties to a conflict, either because of their economic power or because of their involvement in the conflict. By explicitly urging such States to take action, the resolution

188 On the whole with similar argumentations see Zappalà, p. 891 and 896.

189 Zappalà, p. 900.

190 As mentioned before, in December 2019, the amendment in this respect was adopted in the Rome Statute; on the overall topic, see Zappalà, p. 901 f.

191 USA (in 2002) and Russia (in 2016) have expressed both formally their intention not to ratify the Rome Statute, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en#12; and https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en#9 (last visited 31 August 2023). In this regard, it has to be recalled that the Court is entitled to exercise its jurisdiction over nationals of either of these States, irrespective of their ratification of the Statute, if the crimes allegedly were committed on the territory of one of the State Parties; see Zappalà, p. 902.

192 Zappalà noted hereto "One would be tempted to say that unlawful denial is per se a violation (otherwise, it would not be unlawful!)," Zappalà, p. 897.

recalls that such States have a more far-reaching obligation to act with regard to the duty to ensure respect for IHL. Also, with regard to holding parties to a conflict criminally accountable for starvation, the Council, in operative paragraph 10, refers to the responsibility of the international community and urges States to conduct investigations, within their domestic jurisdiction, into violations of IH.[193]

Thus, in summary, it can be concluded that Resolution 2417 (2018) does not establish new powers for the Council, nor responsibilities or measures for parties to a conflict in situations of arbitrary withholding of consent to humanitarian relief operations. However, it does contain certain (politically) important statements. One of the merits of the Resolution is that it recognises the link between armed conflict and food insecurity, and that this can lead to threats to peace and security.[194] In addition, by dealing with the issue in a thematic resolution, the Council provides a document that expresses the Council's views independently of a specific conflict situation.[195] Another achievement of the Resolution is certainly the active encouragement of States and the Secretary-General to report situations of arbitrary withholding of assistance, and the reminder of the duty of the international community to act, in particular States with influence over parties to conflict, and to investigate situations of starvation within their domestic jurisdiction. The Resolution implies a proactive role for the international community in situations where relief is arbitrarily withheld. And although no specific measures are provided for, the Resolution is a recognition that further action could be taken in specific situations.[196] So far, however, the Security Council has not implemented this Resolution to act against parties to a conflict for arbitrarily denying humanitarian access to civilians or using starvation as a method of warfare.

2.2.2.5 *Alternative to Resolutions: Presidential Statement*

Finally, it is briefly mentioned that in situations where the necessary consensus for a resolution cannot be achieved or is vetoed by a permanent member of the Council, an alternative could be the adoption of a Presidential Statement by the sitting President of the Council on behalf of the Members. Although Presidential Statements also require consensus, the necessary consensus is

193 Zappalà, p. 903.

194 For example, the US representative stated at the adoption of Resolution: "the connection between conflict and hunger is undeniable. We are pleased that today's resolution definitively resolves any remaining doubt about that link," see Zappalà, p. 890.

195 Zappalà, p. 889.

196 Zappalà, pp. 890 and 893.

easy to achieve since, unlike Security Council resolutions, they are not legally binding. Despite their non-binding nature, Presidential Statements can exert political pressure on the parties concerned by implicitly signalling that a particular situation has come to the attention of the Security Council and that the Council may take further action if the situation should not improve.[197] The Security Council has expressed concern or condemned the obstruction of humanitarian assistance in several presidential statements.[198] For example, in its Statement on 3 August 2023, it recalled its Resolution 2417 (2018) and expressed concern about the increasing number of armed conflicts in different geographical areas of the world and reiterated the need to break the vicious cycle between armed conflict and food insecurity. It also condemned the use of starvation of civilians as a method of warfare, as well as the unlawful denial of humanitarian access and the deprivation of civilians of objects essential to their survival, including deliberate obstruction of relief and access in response to conflict-related food insecurity in situations of armed conflict, which may constitute a violation of international humanitarian law. It recalled the link between armed conflict and conflict-related food insecurity and called on all parties to armed conflict to comply with their obligations under international humanitarian law to respect and protect civilians.[199]

2.2.3 UN General Assembly

The General Assembly has expressed on several occasions its concerns about access to humanitarian relief. A landmark resolution of the Assembly in this regard was the Resolution 46/182 in 1991, in which the Assembly called on States whose population are in need of relief to facilitate the work of humanitarian actors in implementing relief assistance.[200] Since then the General Assembly has adopted numerous thematic resolutions on humanitarian assistance.[201] For example, as a reaction to increasing attacks on humanitarian personnel, the General Assembly adopted in December 2018 four thematic resolutions on coordination of humanitarian and disaster relief aid, inter alia the resolution on "strengthening of the coordination of emergency humanitarian assistance of the United Nations" in which the GA encouraged Members States "to ensure

197 For example, FARRALL, p. 21.

198 Other examples are Statements of the President of the Security Council of 9 August 2017 (S/PRST/2017/14) and 29 April 2020 (S/PRST/2020/6).

199 Statement by the President of the Security Council of 3 August 2023 (S/PRST/2023/4), p. 3.

200 UN GA Resolution 46/182, principle 5, 6 and 7. See SFDA, p. 14 with further references.

201 See also UN GA Resolutions 58/114, para. 7–10; 59/141, paras. 11 and 18 or 62/95, para. 4; see on this SFDA, p. 14 with further references.

that the basic humanitarian need of the affected populations, including water, food, shelter, health are addressed." The General Assembly has also adopted resolutions in response to specific situations of armed conflict, where it condemned impediment of relief actions and emphasised the conflict party's obligation towards civilians to grant access to relief supplies. For example, in its resolution on emergency assistance to Sudan in 1996, the UN Secretary-General stated that: "Any attempt to diminish the capacity of the international community to respond to conditions of suffering and hardship among the civilian population in Sudan can only give rise to the most adamant expressions of concern as a violation of recognised humanitarian principles, most importantly, the right of civilian populations to receive humanitarian assistance in times of war."[202] Since then, the General Assembly has reaffirmed its view on the unlawfulness of arbitrary impediment of relief in various resolutions.[203]

2.2.4 UN Human Rights Council

As an inter-governmental body responsible for strengthening the promotion and protection of human rights, the Human Rights Council can address any situations of human rights violations which require particular attention of the international community, thus also situations of arbitrary withholding of consent to relief operations.[204] Even though the focus lies on human rights standards, the Human Rights Council takes in its work, as mentioned before, also possible breaches of IHL norms into account.[205] For example, circumstances of arbitrary withholding of consent can be invoked by States within Universal Periodic Review (UPR) processes of the Council (2.2.4.1). Further, the Council can also apply special procedures such as special rapporteurs or representatives, independent experts or working groups that "monitor, examine, advise and publicly report" on situations of arbitrary impediment of relief (2.2.4.2).[206] Finally, the Council also has the possibility to assess the withholding of consent as arbitrary in the case where individuals complain about an impediment of relief as a human rights violation before the Council. The possibility

202 UN Secretary-General Report on emergency assistance to Sudan, para. 706.

203 For example, UN GA Resolutions: 46/242, para. 622, 49/196 and 50/193 para, 623, 52/140, para. 624 and 52/145, para. 625; 55/2, para. 704; see also the ICRC Study on Customary IHL, Rule 55.

204 General description of the mandate of the Human Rights Council, see https://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx (last visited 31 August 2023).

205 See on this Sivakumaran, Non-International Armed Conflict, p. 467.

206 Even though today there is no such thematic mandate, there are country-based mandated Special Rapporteur, who could also report on situations of arbitrary withholding of consent.

of complaint procedures for individuals will be discussed in detail later as a possible means for individuals to act in situations of arbitrary withholding of consent.

2.2.4.1 *UPR Process*

The UPR process is similar to the treaty monitoring mechanism which is outlined later. Reference is therefore made to what is said there. Particularly noteworthy in the context of the UPR Process, however, is the fact that in the past, in situations where relief was impeded in the State under review, States have pointed this out and made recommendations to the reviewed State to enable the effective and timely delivery of relief.[207] States did however not explicitly cite such situations as arbitrary or condemned them as breaches of IHRL and IHL. An explicit legal determination of the situation might have a greater impact on the reviewed State and can therefore be suggested for future reviews. The Advisory Committee could serve the Council in this respect with thematic expertise.[208]

2.2.4.2 *Special Procedures*

An important special procedure in the context of relief action is, for example the Special Rapporteur, on the right to food.[209] He or she monitors how the right to food is implemented in the Member States, also in situations of crisis. To this end, the Special Rapporteur undertakes country visits and gets first-hand information on how the right to food is implemented and respected in a specific country. Through dialogues with relevant actors for example in

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207 For example, recommendation for Syrian Republic, Second Review Session 26; Review in the Working Group: 31 October 2016, Adoption in the Plenary: 16 March 2017, available at https://www.upr-info.org/sites/default/files/documents/2016-11/a_hrc_wg.6_26_l.2_syria.pdf; see also Report of the Human Rights Council in its thirty- fourth session, 31 March 2017, A/HRC/34/5; Recommendation for Sudan, Second Review Session 25; Review in the Working Group: 4 May 2016 Adoption in the Plenary: 21September 2016, available at https://www.upr-info.org/sites/default/files/documents/2016-11/recommendations_and_pledges_sudan_2016.pdf ^; see also Report of the Human Rights Council in its thirty- third session, 16 December 2016, A/HRC/33/2 (all last visited 31 August 2023).

208 On the mandate of the Advisory Committee, see https://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/HRCACIndex.aspx (last visited 31 August 2023).

209 The Special Rapporteur on the right to food was mandated originally by the Commission on Human Rights in April 2000 based on the Resolution 2000/10. Following the replacement of the Commission by the Human Rights Council in June 2006, the Council endorsed and extended that mandate with the Resolution 6/2 of 27 September 2007; see on the whole, the description of the Special Rapporteur on the right to food, available at https://www.ohchr.org/en/issues/food/pages/foodindex.aspx (last visited 31 August 2023).

seminars, conferences and expert meetings, the Special Rapporteur can further promote the full realisation of the right to food. Where a violation of the right to food is alleged in an individual complaint before the Human Rights Council against that country, the Special Rapporteur also has the possibility to discuss with the government and other concerned parties on that issue.[210]

In her final report on 21 January 2020, Hilal Elver, the Special Rapporteur on the right to food, stated that during the course of her mandate the worst food crises have occurred in areas of armed conflicts and that in 2018, over 113 million people were affected. She mentioned:

> *"In Yemen, for example, the World Food Programme has launched its largest ever emergency response as a result of the country's ongoing civil war. However, 15.9 million people are experiencing hunger each day and this number could reach 20 million if humanitarian assistance is not delivered."* She further noted that *"*[*h*]*umanitarian assistance* (…) *has become increasingly critical, but is subject to political manipulation."*[211]

Prosecution of starvation remains nearly non-existent, as it is usually committed during internal conflicts. As a positive development, in January 2020 the Assembly of States Parties to the International Criminal Court unanimously voted to amend the Rome Statute to recognise the crime of starvation in non-international armed conflicts.

The Human Rights Council could apply a new special procedure to report on situations of arbitrary withholding of consent as a thematic mandate.

2.2.5 UN Human Rights Treaty Bodies

There are three main procedures in human rights treaties which allow State parties, respectively the treaty bodies, to act in response to situations of serious and grave violations of human rights: namely, within the monitoring mechanism (2.2.5.1), by inter-State communication (2.2.5.2) or through an inquiry procedure (2.2.5.3). There is also the possibility for individuals to complain, which will be outlined later as a method for individuals to respond to situations of arbitrary withholding of consent.

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210 See the description of the Special Rapporteur on the right to food, available at https://www.ohchr.org/en/issues/food/pages/foodindex.aspx (last visited, 31 August 2023).

211 Report of the Special Rapporteur on the right to food, Critical perspective on food systems, food crises and the future of the right to food, 21 January 2020, A/HRC/43/44.

2.2.5.1 *Monitoring Mechanisms*

All UN human rights treaties provide a monitoring mechanism that allows treaty bodies to periodically evaluate on a State party's progress and difficulties in implementing the respective treaty.[212] Monitoring mechanisms do not focus on individual cases, but take records of the overall legal situation in a State which is drawn up over a period of several years.[213] Thus, situations of arbitrary withholding of consent to relief operations will be denounced as a violation of the respective human rights treaty within such a proceeding when it occurs systematically. In such cases, the treaty body not only has the possibility to constitute a breach of the treaty, but can also mention the provision of consent as a recommendation in the Concluding Observations. Some treaty bodies, such as the CESCR and CCPR, have in the past expressed concerns in their Concluding Observation with regard to the impediment of relief provisions during armed conflicts. They have also underlined the aspect that this constitutes a breach of law, even though they do not always expressly mention that consent to relief has been arbitrarily withheld.[214]

The CESCR has for example stated in its Concluding Observations on Sri Lanka in 2010 in respect of the last period of internal armed conflict in 2009 only implicitly:

> The Committee expresses deep 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). 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.[215]

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212 Also, some of the regional human rights treaties know similar monitoring mechanisms, for example, Article 19 AP 1/ACHR, Article 63 AfCHR and Article AP 2/AfCHR; but not ECHR; see KÄLIN/KÜNZLI, p. 249 f. and 254.

213 KÄLIN/KÜNZLI, p. 254.

214 See for example implicitly in the Concluding observation of the CESCR on Kongo at its forty-third session, E/C.12/COD/CO/4, 16 December 2009, para. 33; CESCR on Sudan, E/C.12/SDN/CO/2, 27 October 2015, para. 33.

215 Concluding observations of the CESCR on Sri Lanka at the forty-fifth session, E/C.12/LKA/CO/2-4, 9 December 2010, para. 28.

The CCPR, on the other hand, expressed its concern and recommendation on the situation in Sudan in 2014 explicitly as follows:

> The Committee is (…) concerned at reports indicating that State party authorities have at times arbitrarily denied the timely access of life saving humanitarian assistance for civilian populations in some conflict-affected areas, particularly those controlled by rebel groups (arts. 2, 6, 7, 9 and 12). In light of the Committee's previous concluding observations (…), the State party should: (…) Authorize and facilitate the timely and unrestricted access of humanitarian assistance to civilian populations in all conflict-affected areas in full compliance with the prohibition of arbitrary denial of humanitarian access.[216]

Concluding observations of treaty committees are often criticised as not being tough enough on States for human rights violations.[217] Monitoring procedures are also not the most adequate mechanism for situations of arbitrary withholding of consent, since such situations require particularly rapid reactions which cannot be provided by a process that is performed periodically, several years apart.[218] However, monitoring mechanisms are nevertheless considered as important instruments particularly for further development of the law.[219] States take also comments made by the Committee seriously and may take efforts to apply the proposed recommendation.[220] While the Committees do not have the power to enforce remedial action, States or private actors like NGO or individuals can use the public comments and recommendations of treaty bodies when they attempt to hold the concerned State accountable for its actions.[221]

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216 Concluding observations of the CPPR on Sudan, CCPR/C/SDN/CO/4, 19 August 2014, para. 8 (f).

217 FORD, p. 8.

218 Monitoring mechanisms are generally criticised as a weak enforcement tool for different reasons, for example because they do not enable reaction to individual cases and because recommendations are often formulated very generally and with restraint, see on this KÄLIN/KÜNZLI, p. 259 f.

219 In addition to reactive and incidental procedures, specific preventive procedures (although reactive procedures may have partial preventive effects) are necessary to prevent future infringements, this purpose serves also monitoring mechanisms KÄLIN/KÜNZLI, p. 259 and 281.

220 States may take efforts to apply the recommendations and reply to the comments in their following reports, see on this for example, FORD, p. 8.

221 See on the whole, Ford, p.8.

2.2.5.2 *Inter-State Communication*

Arbitrary withholding of consent can be invoked by States before a human rights treaty body as a violation of the human rights enshrined in the respective treaty. Such complaints can also be submitted by State parties who are themselves not injured.[222] Most of the UN human rights treaties, including ICESCR and ICCPR, set out the possibility of inter-State communications which allow State parties to complain to the relevant UN treaty body or an ad hoc Conciliation Commission about a violation of a treaty by another State party.[223] Beside UN human rights treaties, most of the regional human rights treaties also know such procedures.[224] The sequence of the process does however differ significantly depending of the concerned treaty body and will be not discussed here further. It should be noted that until today, no such procedure has been conducted before a UN treaty body.[225] The doctrine mentions that a reason for this could be that filing such a complaint constitutes an unfriendly act. States may therefore fear political and economic consequences in the intergovernmental relationship. In addition, it is mentioned that such a complaint also entails an enormous procedural effort for the complaining State, since it must substantiate its complaint. This represents a great burden, especially for smaller States who do not have the necessary resources to carry out the complex investigations. Against this background, the invocation of States before the Human Rights Council appears to be a simpler alternative, where the necessary clarifications are made by a special rapporteur.[226]

2.2.5.3 *Inquiry Procedure*

It is also possible that in situations of arbitrary withholding of consent, treaty bodies initiate and conduct inquiries themselves in respect to the wrongful acting State party for violating the treaty. Almost all UN human rights

222 KÄLIN/KÜNZLI, p. 279.

223 For example, Article 21 CAT, Article 74 CMW, article 32 CED, Article 10 of the Optional Protocol to the ICESCR. CERD, CCPR and CRC: Articles 11–13 ICERD, Articles 41–43 ICCPR set out for the resolution of disputes between States parties under the relevant Convention/Covenant the establishment of an ad hoc Conciliation Commission. ICERD applies the procedure to all States parties, for ICCPR and CRC applies it only to State which has accepted the competence of the relevant Committees in this regard. In 2018, three inter-state communications were submitted under Article 11 of the Convention on the Elimination of All Forms of Discrimination, for first time in its history.

224 Article 33 ECHR, Article 45 ACHR and Article 48 AfCHPR; see on the whole KÄLIN/KÜNZLI, p. 279.

225 Some processes only took place at the regional level in Europe, Africa and America, see on this KÄLIN/KÜNZLI, p. 280.

226 KÄLIN/KÜNZLI, p. 281.

conventions authorise their treaty bodies to carry out such inquiries including ICESCR and CAT, but not ICCPR.[227] In order to activate the inquiry procedure, which is generally facultative,[228] it requires first that the concerned State party has recognised the competence of the respective Committee to undertake such inquires. Further, the Committee needs reliable and well-founded evidence on grave and serious violation of the convention they monitor.[229] Thus, for situations where consent to relief is withheld, the Committee must have sufficient information that indicates that the withholding is arbitrarily and constitutes therefore a serious and grave violation of the relevant convention.

As a first step, the State concerned is asked for its opinion. The actual inquiry begins only if the allegations are not credibly refuted. The findings of the examination are confidentially transmitted to the concerned State party with further comments and recommendations. After about 6 months, the State party has to inform the Committee about the measures which it has taken in response of the recommendations.[230] Hence, where the State has violated the treaty provision by withholding consent to relief arbitrarily, the State has to either respond by providing the required consent or at least explain why consent could still not be provided.

The inquiry procedure has so far only been used by the Committee against Torture.[231] The reason for this could lie in the fact there is already a similar non-contractual procedure of the Human Rights Council, which doesn't require the evidence for the breach of a specific treaty. On the other hand, the procedure has various weaknesses. For example, the consent of the State concerned is required when investigations must be carried out on its territory, which is essential to conclusively examine the merits of the complaint. In addition, the confidentiality of the procedure may not exert the desired pressure on the

227 Relevant mandate for the Committee on Economic, Social and Cultural Rights in Article 11 of the Optional Protocol to the ICESCR, similar provisions exist also for the Committee against Torture in Article 20 CAT or the Committee on the Rights of the Child in Article 13 of the Optional Protocol on a communications procedure to CRC.

228 States parties have in general the posssibility to opt out of the inquiry procedure by declaring that they do not recognise the competence of the Committee to conduct inquires, for example provided for by Article 28 CAT; Article 10 of the Optional Protocol to CEDAW; article 8 of the Optional Protocol to CRPD; Article 13(7) of the Optional Protocol (on a communications procedure) to CRC or Article 11(8) of the Optional Protocol to the ICESCR. An excepetion to this is CED as the competence to conduct inquiries is not subjected to the acceptance of the States parties (Article 33 ICPPED).

229 On the overall topic, see https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx (last visited 31 August 2023).

230 KÄLIN/KÜNZLI, p. 282.

231 KÄLIN/KÜNZLI, p. 282.

State concerned. Finally, such a procedure can hardly provide a rapid response in situations where human rights violations require immediate action,[232] which is particularly true for cases where consent to relief actions is withheld.

2.3 *Acting at the Request of the Conflict Parties*

2.3.1 As Protecting Powers?

The Protecting Power mechanism was already incorporated in the 1929 Geneva Convention and was later consolidated and adopted in the 1949 Geneva Conventions and AP I.[233] It is one of the few mechanisms which is provided by the GCs through which third parties may support conflict parties with compliance with IHL.[234] Even though the Protecting Powers concept was designated with the aim of taking an important role for the implementation of IHL, in practice, however, Protecting Powers were rarely applied,[235] questioning the potential applicability of the concept for situations of arbitrary withholding of consent.

A Protecting Power can be appointed in situations where the concerned States in conflict have suspended or terminated the diplomatic contacts with each other. A neutral State can then be called by a conflict party, with the agreement of the other conflict party, to safeguard its interests towards the other party and serve as an intermediary between them.[236] The likelihood that the Protecting Powers regime could be applied in future in situations of arbitrary withholding of consent to relief operation during non-international armed conflict is not only small in view of the limited use of that regime, but also because it was not designated to be applied to situations of non-international armed conflict. It may be theoretically conceivable that the application of the Protecting Powers system could get extended to situations of non-international armed conflict.[237] But one of the objections against such

232 On the overall topic, see KÄLIN/KÜNZLI, p. 282 f.

233 1929 Geneva Convention, Article 86; 1949 First, Second, and Third Geneva Conventions, Articles 8–11; 1949 Fourth Geneva Convention, Articles 9–12; Additional Protocol I, Article 5.

234 HEINSCH, p. 80.

235 The last reported instance occurred over three decades ago: Since 1949, the Protecting Powers system has been used for example during the Suez crisis in 1956, in Goa I 1961 and in the conflict between India and Pakistan from 1970 till 1971 and also in the Falklands/Malvinas conflict in 1982; see SIVAKUMARAN, Non-International Armed Conflict, p. 457 with further references; see also PEJIC, p. 318.

236 SIVAKUMARAN, Non-International Armed Conflict, p. 457.

237 A neutral State may carry out the role on behalf of an armed group, there is one instance of this in practice over a century ago, see SIVAKUMARAN p. 457 f.

an extension of the law could be that this would allow that a Protecting Power could also be appointed on behalf of an armed group to promote its interest. Since there is a big opposition in the international community to any efforts which could confer non-State armed groups any status of rights to safeguards their interests, the chances of an extension of the Protecting Power's system to non-international armed conflicts is highly unlikely.[238]

2.3.2 International Humanitarian Fact-Finding Commission

Since establishing international courts or tribunals for breaches of IHL seemed to be for a long time an unrealistic demand, AP I introduced in 1977 the International Humanitarian Fact Finding Commission (hereafter: Commission) as a new mechanism which should enhance compliance with IHL.[239] As it will be shown in the following, this system did not achieve the expected success as an IHL enforcement mechanism. But since it does not provide any particular rights to non-State actors to represent its interest, an evolvement of this mechanism for situations of non-international armed conflict seems (in contrast to the system of Protecting Powers) not to be excluded.

2.3.2.1 *Competence of the Commission*

The Commission is an independent and impartial body. It was established as a permanent international institution in 1991 pursuant to Article 90 of AP I and became operative in 1992 after the acceptance of its competence and rules by 20 States.[240] Today, the Commission counts 77 Member States.[241] Based on Article 90(2)(c)(i) AP I, the Commission is competent to enquire into any facts alleged to be grave breaches or other serious violations of the Geneva Conventions or of the AP I. The enquiry is conducted by a chamber of the seven members, who are not nationals of any party to the conflict. The chamber invites the parties to the conflict to assist in its enquiry und finally submits a report on its findings.[242] The Commission may further use its good offices to make recommendations for promoting compliance with the Geneva Conventions and AP I (Article 90(2)(c)(ii) AP I).[243] The Commission is not a

238 See argumentation in SIVAKUMARAN, Non-International Armed Conflict, p. 458.

239 HEINSCH, p. 80.

240 SIVAKUMARAN, Non-International Armed Conflict, p. 459; AZZARELLO/NIEDERHAUSER, Blog Article ICR.

241 List of the State parties, available at https://www.ihffc.org/index.asp?Language= EN &page=statesparties_list (last visited 31 August 2023).

242 HEINSCH, p. 88.

243 AZZARELLO/NIEDERHAUSER, Blog Article ICR; ICRC, Commentary on the APs, para. 3625; see SIVAKUMARAN, Non-International Armed Conflict, p. 460; It has been

judicial body and does not have the competence to conduct a legal evaluation of the established facts and hold the conflict parties accountable for violations of IHL. The recommendations of the Commission are therefore not legally binding to the concerned parties.[244]

Even though the Commission's mandate is based on AP I, which refers to international armed conflicts, the Commission has consistently declared that it would also carry out enquires in situations of non-international armed conflict.[245] This understanding goes also along with the wording of Article 90(2)(c)(i) AP I which gives the Commission competence over the Geneva Conventions. This includes also Common Article 3 of the GCs and thus non-international armed conflicts.[246] Since the formulation of Article 90 AP I does not include AP II, some authors are of the opinion that the Commission may not be competent for non-international armed conflicts.[247] In contrast, other authors go with the interpretation that the limitation given to non-international armed conflicts by Common Article 3 cannot be understood as the Commission not having the competence to asses violations of non-international armed conflicts in the sense of AP II.[248] Further, it is pointed out that a limitation doesn't make sense in view of Article 90 AP II which, as it will be outlined later, enable also an employment of the Commission on the basis of the consent given by the parties. It seems therefore reasonable to follow the view that the Commission may provide enquires in situations of non-international armed conflict, irrespective if the conflict is covered by Common Article 3 or AP II. This understanding was also confirmed by the Commission's first mandate in 2017, which took place in the context of a non-international armed conflict.[249]

Enquires of the Commission require according to Article 90(2) AP I, the consent of all parties involved. Art. 90 AP presents two possibilities on how parties can consent to the competence of the Commission. First, when the

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questioned in the past whether the competence of the Commission to offer its good offices is dependent on the enquiry procedure. It is argued in the doctrine that the structure of Article 90(2) AP I speaks in favour of the separation of the two competences. This approach has been also approved several times by the Commission that it is able to conduct its services independently, see on this HEINSCH, with further references, p. 87 f.

244 HEINSCH, p. 86; AZZARELLO/NIEDERHAUSER, Blog Article ICRC.

245 For example, Report of the International Fact-Finding Commission 1991–1996; see HEINSCH, p. 84 f.

246 See SIVAKUMARAN, Non-International Armed Conflict, p. 460, HEINSCH, p. 84; see also AZZARELLO/NIEDERHAUSER, Blog Article ICRC.

247 HEINSCH, p. 85.

248 SIVAKUMARAN, Non-International Armed Conflict, p. 260.

249 On the Commission's first mandate, see HEINSCH, p. 85.

parties involved have made in advance an ipso facto declaration to enquires of the Commission in relation to States which made the same declaration (Article 90(2)(a) AP I), it is required in practice, that at the moment where the Commission requests an enquiry, the parties confirm their declaration. Since they have already made a declaration, it is assumed that these States have an obligation to accept the enquiry. Nevertheless, their reaffirming consent is required out of practical reasons, since no enforcement unit exist in that context.[250] Second, consent can also be given ad hoc for specific situations. Namely, when a Party to the conflict requests the Commission, it can institute proceedings if the other party or parties concerned agree to the enquiry too (Article 90(2)(d) AP I).[251] Consequently, for situations of non-international armed conflict, the consent of the affected State is required as well as the consent of the involved non-State armed groups. Hereto, according to the doctrine, pre-existing declarations of the States that have already accepted the competence of the commission are not applied during non-international armed conflict. Rather, the consent has to to begiven ad-hoc by both parties in the sense of Article 90(2)(d) AP I since non-State armed groups cannot be bound based on a previous declaration.[252] The requirement of consent is considered as one of the major reasons why the commission remained inactive since its creation until 2017. Even though the commission had constantly offered its services to conflict parties in the past, it was unable to act due to the lack of consent of both the parties. The commission was therefore called "the Sleeping Beauty"[253]

250 It is also unsatisfying, that declarations of Article 90 AP I are not yet made by important and military powerful countries like the United States, France, China, Israel and India, see HEINSCH, p. 87.

251 On the overall topic, see HEINSCH, p. 83.

252 This argumentation is based on the fact that an otherwise non-State armed group may benefit from former declaration of the affected State, while the State does not have that possibility. Further, there are distinguished views in the doctrine on whether a complaint could also be initiated by a non-State armed group. According to ICRC, only States are competent to submit a request for an enquiry. Such an understanding would, however, go against the idea of equality of the conflict parties in IHL. It is therefore more convincing if the right of raising a complaint is also given to non-State actors. This is in line with the wording in Article 90(2)(c) which refers to ad hoc requests and consent from the conflict parties. In practice, the Commission has been approached by various non-State armed groups. In such situations, the Commission has not responded that this process could not be invoked by armed groups. The enquiry finally did not take place because the concerned State did not give its consent, see on this SIVAKUMARAN, Non-International Armed Conflict, p. 460 f., and also AZZARELLO/NIEDERHAUSER, Blog Article ICRC.

253 KALSHOVEN, The International Humanitarian Fact-Finding Commission, 836.

or an "almost toothless body" which would most likely never become an effective mechanism for the enforcement of IHL.[254]

There are also other shortcomings in the competence of the Commission. For example, the report on the findings will be published by the Commission only if all parties to the conflict agree. This constraint undermines the possible impact of the report on the prevention of further violations of IHL, since it is unlikely that States will change their behaviour based on a report that is not going to be published and will invoke critics and pressure from the international community.[255] This is the case even though the obligation of the Commission on confidentiality does not preclude that one of the parties may publish the report on their accord. But even such a one-sided publication may involve some risks like, for example, the respective party not publishing the complete report.[256] Thus, the Commission has disadvantages and challenges, which make it difficult for it to act as an effective body.

2.3.2.2 *The Commission's First Mandate*

The Commission was mandated with an enquiry for the first time in May 2027. The Commission was requested by the OSCE to investigate the explosion of an OSCE vehicle which occurred in April of that year in Pryshy (Luhansk Province), an area in Eastern Ukraine which is controlled by rebels. The explosion caused the death of a paramedic and injuries to two monitors of the OSCE Special Monitoring Mission to Ukraine (SMM). On 18 May 2017, the Secretary General of the OSCE and the President of the IHFFC signed a memorandum of understanding between the two organisations, followed by a distinct agreement relating to the incident on an independent forensic investigation by the Commission. The purpose of the investigation was to establish the facts of the incident against the background of international humanitarian law. According to their mandate, criminal responsibility, and assessment of accountability for the explosion was outside the scope of the Commission's investigation. The investigation was provided with the consent of the Ukraine government.

Until today, the legal basis for the Commission's involvement in that case is controversial. It raised the question as to whether intergovernmental organisations such as the OSCE would fall under the scope of application of Article 90 AP I to request an enquiry. According to Article 90(2)(a) AP I, the competence to submit a request to the Commission is limited to the 'High Contracting Parties' such as member States and ad hoc consent can be provided according to Article

254 SIVAKUMARAN, Non-International Armed Conflict, p. 461.
255 HEINSCH, p. 88.
256 HEINSCH, p. 89.

90(2)(d) by 'Parties to the conflict'. Before this incident, the Commission stated in its Report of 2015 that non-State actors, including international organisations, have the entitlement to submit a request as long as they are 'concerned' parties to the conflict. It seems therefore that, according to the Commission, international organisations could fall under the definition of conflict parties in the sense of Article 90(2)(d) of AP I on the condition that they are considered as concerned by an ongoing conflict.[257] However, the Commission has not yet defined when this might be the case. The question as to whether the consent of the government of Ukraine was sufficient even though the incident occurred in an area under control of rebels also remains unanswered. According to the mandate, an enquiry of the Commission require the consent of all parties involved.[258]

Despite the unsure legal basis, the Commission presented its report to the Permanent Council of the OSCE. The full report was only made available to the OSCE, while an Executive Summary of the report was published on the official internet site of the Commission in September 2017. The Commission undertook several investigative steps, including interviewing witnesses, inspecting materials and conducting a forensic medical analysis. In its report, the Commission finally concluded that it was unlikely that the SMM was intentionally targeted given the circumstances of how the incident occurred. The explosion was identified as being more likely caused by a mine which was laid to target any vehicles passing by. Given the fact that any civilian vehicle which was heavy enough was able to trigger the mine, the Commission concluded that the placement of the mine was an indiscriminate and therefore unlawful usage of an anti-vehicle mine, according to international humanitarian law.[259]

2.3.2.3 *Perspectives for Deploying the Commission in Practice*

Since its first mandate in 2017, the Commission did not get any new requests. It seems that the first case of the Commission did not set the expected example for encouraging other conflict parties.

Even though the Commission may theoretically be able to perform enquires (also in situations of non-international armed conflict where the consent to relief operations is withheld arbitrarily), the requirement of consent of all

257 AZZARELLO/NIEDERHAUSER, Blog Article on ICRC (last visited 31 August 2023).

258 HEINSCH, p. 91 f.

259 HEINSCH, p. 91 f. The Executive Summary of the Report of the Independent Forensic Investigation in relation to the Incident affecting an OSCE Special Monitoring Mission to Ukraine, on 23 April 2017, available at https://www.osce.org/home/338361 (last visited 31 August 2023).

conflict parties remains an obstacle for the Commission to get active in practice. The Commission's opinion that international organisations may also request an enquiry may have opened a new possibility, for example international humanitarian organisations may get proactive in situations of arbitrary withholding of consent during non-international armed conflicts. But as mentioned before, it is unclear when international organisations will be considered by the Commission as concerned parties to the conflict. Further, the requirement of consent of the involved conflict parties also remains in situations where an international organisation requests the enquiry. Thus, in addition to the organisation's request, the consent of the affected State and the consent of the non-State armed groups involved are required.

Even though there were and are other fact-finding missions established within the UN-System,[260] the investigation of IHL violations does not belong to the core mandate of any other missions. They are mostly human rights commissions, and the composition of those commissions does not provide a IHL specialisation to assess violations of IHL.[261] The Commission is the only fact-finding mechanism which is dedicated exclusively to inquiries of IHL violations. In addition, the inquiry of the human rights commission is fundamentally different to the one of the Commission. While the goal of the Commission's inquiry is to conciliate and pacify, the human rights commissions rather condemn and provoke.[262] The Commission is also, compared to judicial enforcement mechanisms, a rather "soft" instrument for ensuring compliance with IHL.[263] The Commission provides solutions that are not offered by other fact finding or judicial institutions.[264] It is therefore argued in the doctrine, that the Commission should keep its own room in the international enforcement system, even though it has not yet been active many times.[265] However, in order to overcome its lack of activation in the past, the mechanism of the Commission has to be adjusted in some areas. The final chapter will therefore discuss whether the Commission can be made more effective so that it can contribute to the compliance with IHL, including in situations of arbitrary withholding of consent.

260 For example, the UN Human Rights Council has established quite a number of commissions of inquiry and fact finding, HEINSCH, p. 82.

261 HEINSCH, p. 82 and 91.

262 HEINSCH, p. 90.

263 HEINSCH, p. 80.

264 IHFCC, Report on the Work of the IHFFC on the Occasion of its 20th Anniversary, February 2011, p. 28; SCHOTTLER/HOFFMANN, p. 259.

265 HEINSCH, the Future of the IHFFC, p. 82 and 93 f., and 96.

3 Judicial Mechanisms

Non-belligerent States also have the possibility to pursue the judicial accountability of those who are responsible for the arbitrary withholding of consent. In this regard, it should be noted that within judicial enforcement, the courts and commissions establish only the infringement of the law and award restitutions. They do not (in general)[266] order specific measures. Thus, that consent to relief actions shall be provided in a particular situation of arbitrary withholding of consent, cannot be pronounced by those courts. It is up to the State concerned to implement the judgement.

There are different forms of judicial enforcement for breaches of IHL and IHRL.[267] However, not all are applicable to non-State armed groups. Namely, the jurisdiction of the International Court of Justice (3.1) and regional human rights courts (3.2) are limited towards States.[268] Criminal Jurisdiction, in contrast, is also possible against members of a non-State armed group (3.3). Within the scope of the present book, the procedures of judicial organs will be (here and for the individual complaint procedures later) roughly outlined. Admissibility requirements which those procedures require will be treated only selectively.

Another possibility to hold States and non-State armed groups criminally accountable for their actions are international ad hoc tribunals. Such tribunals were set up by the UN Security Council under Chapter VI of the UN Charter following conflicts in Yugoslavia, Rwanda, Sierra Leone and Cambodia.[269] Since the establishment of such tribunals is rare and it is expected that they will decrease than increase in future,[270] they are not separately discussed in the present book. But cases where the ICTY had to deal with situations of denial of relief will be mentioned later in the context of the ICC. Finally, also possible

266 Exceptions are possible, for example the ECtHR in the *Case Assanidze v. Georgia*, Grand Chamber, sentencing: "Holds unanimously (a) that the respondent State must secure the appliacant's release at the earliest possible date."; hereto KÄLIN/KÜNZLI, p. 274 f and fn. 125.

267 SIVAKUMARAN, Non-International Armed Conflict, p. 475 ; GILLARD, p. 34.

268 The Organisations of America States has called upon the Inter-American commission to address the issue of human rights violations by armed groups. The Inter-American Commission on Human Rights

however denyed with the argumentation, that involving acts of terrorism of non-State armed groups would implicity lace terrorist organisations on an equal footing with government(s), see on this SIVAKUMARAN, Non-International Armed Conflict, p. 504.

269 FORD, p. 8.

270 HEINSCH, p. 96.

for non-belligerent States is the prosecution of crimes on the basis of universal jurisdiction at national level.[271] The obligation of non-belligerent States to ensure respect for IHL also includes the duty to investigate alleged crimes of individuals and to prosecute and punish those who are responsible.[272] The present book, however, focuses on international enforcement, therefore this option will also not be discussed further.

3.1 *International Court of Justice* (*ICJ*)

The International Court of Justice (ICJ) is competent to examine breaches of obligations under international law. As an inter-State mechanism, questions of IHRL and IHL do not occupy a central place in the Court's jurisprudence.[273] Nevertheless, non-belligerent States (that are Members of the UN or States which have become parties to the Statute of the Court or accepted its jurisdiction under certain conditions) have the possibility to invoke the concerned State's responsibility for arbitrary withholding of consent to humanitarian relief either by submitting an (unilateral) application or (together with the concerned State) submitting a bilateral notification before the ICJ. The judgment of the court is final and binding on the parties to a case, in which the Court can determine breaches of international law and compel the wrongful State to pay reparations towards the plaintiff State. It is also possible that UN organs (the UN General Assembly and the Security Council for any legal questions) and specialised agencies (only when the legal question falls within the scope of their activities) can request the ICJ for an Advisory Opinion on the obligation of a State with regard to the provision of relief and the arbitrariness of withholding consent to relief in general.[274]

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271 Based on the principle of universal jurisdiction, national courts of a State have jurisdiction over international crimes such as war crimes, crimes against humanity or genocide, irrespective of where it is committed and what the nationality of the perpetrator or the victim is. There are only a few examples where the universal jurisdiction was applied in order to prosecute against members of former foreign authorities or non-State armed groups. For example, the Oberlandesgericht Düsseldorf (Germany) pronounced on the basis of universal jurisdiction a judgement on 12 July 2007 against Bosnian Serb Nikola Jorgic who was the leader of a paramilitary group involved in acts of "ethnic cleansing" of the Muslim population in Bosnia. The Oberlandesgericht Düsseldorf found him guilty of genocide and sentenced him to life imprisonment, see on this La Rosa/Wuerzner, p. 336.

272 OHCHR, human rights in armed conflicts, p. 23.

273 Kälin/Künzli, p. 244.

274 See 'How the Court works', available under https://www.icj-cij.org/en/how-the-court-works (last visited 31 August 2023).

As mentioned before, the ICJ had already dealt with the topic of provision of humanitarian assistance in non-international armed conflicts in the case of "Military and Paramilitary Activities in and against Nicaragua." There, however, the legal considerations were on the conditions to provide relief. Situations of arbitrary withholding of consent to relief were up until today not considered by the ICJ. But on 11 November 2019, the Republic of the Gambia filed at the ICJ an application instituting a proceeding against Myanmar for violations of the Genocide Convention. In reference to the UN Special Rapporteur, Committee on the Elimination of Discrimination against Women and the UN Fact-Finding Missions, The Gambia explains in its application how the forced starvation was implemented by Myanmar. In this regard, it explicitly states that "the humanitarian crisis faced by the Rohingya was further exacerbated by the Government's prohibition of humanitarian assistance to the lockdown zone."[275] Thus, the ICJ hasin this case, at least theoretically, the possibility to present its view on withholding of consent to relief as part of the act of forced starvation and genocide. In view of all the alleged violations against Myanmar in that application ("threats of death, torture, rape, starvation and other deliberate actions" aimed at the collective destruction, in whole or in part, of the Rohingya people[276]), it is to assume that the deprivation of relief will be (if at all) mentioned in a respective judgement briefly and that no in depth discussion will be provided in this regard. However, the mentioning of the situation of withholding of relief in the application alleging forced starvation and genocide has nevertheless a significant importance for the discussion of withholding of consent to relief and what breaches of law it may constitute.

While the ICJ has not yet made a substantive decision on the merits of the case, it did deliver its ruling on Myanmar's preliminary formal objections to The Gambia's application on 22 July 2022.[277] The Court rejected the objections and upheld the Court's jurisdiction and the admissibility of The Gambia's application. In its judgment, the Court addressed, inter alia, Myanmar's objection that The Gambia is not an "injured State" and had not established its individual legal interest in this litigation and therefore lacked standing under the Genocide Convention.[278] Myanmar further argued that The Gambia lacked standing to assert

275 ICJ, *The Gambia v. Myanmar*, Request for provisional measures, 11 November 2019, para. 68, available at https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-EN.pdf (last visited 31 August 2023).

276 Ibid, para. 131.

277 ICJ, *The Gambia v. Myanmar*, Judgment of 22 July 2022 on Preliminary Objections, available at https://www.icj-cij.org/public/files/case-related/178/ 178-20220722-JUD-01-00-EN.pdf (last visited 31 August 2023).

278 Ibid., para. 94 ff.

Myanmar's responsibility on behalf of members of the Rohingya group who are not The Gambian nationals.[279] Even if The Gambia had standing, Myanmar continued in its objections, that The Gambia's standing should be subsidiary and dependent on the standing of Bangladesh as the State "especially affected" by Myanmar's actions. Myanmar argues that Bangladesh would be "the most natural State" to initiate proceedings in this case since it borders Myanmar and has received a significant number of the alleged victims of genocide.[280] In its judgement, the Court recalled its Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide of 28 May 1951 [I.C.J. Reports 1951, p. 15 ff.], in which it stated that, under the Genocide Convention, States Parties "have no interests of their own, they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention." According to the Court, the common interest in compliance with the relevant obligations under the Genocide Convention means that any signatory is entitled to invoke the responsibility of another signatory for an alleged breach of its obligations, *erga omnes partes*, and that the plaintiff is not required to prove a particular interest before bringing a claim. If a particular interest were required for that purpose, in many situations no State would be able to make a claim.[281] Since the right to bring an action arises out of a common interest, the Court further held that such a right is not limited to the nationality of the alleged victims.[282] The Court also confirmed that The Gambia's standing before the Court was not subsidiary and dependent on the standing of Bangladesh because of the fact that Bangladesh faced a large influx of members of the Rohingya group who had fled Myanmar.[283]

This decision supports the earlier findings[284] in this book that, in the case of *erga omnes* obligations, non-injured States may claim before the ICJ the State responsibility of the affected State for the breach of its treaty obligations, since the fulfilment of these obligations is in the interest of the international community as a whole. Moreover, Myanmar's formal objection that The Gambia should be subordinate to Bangladesh in its standing demonstrates that even if the alleged violation by the affected State concerns primarily the situation of its own civilian population, the consequences of such a violation may nevertheless have a particular impact on neighbouring States, so that they can be

279 Ibid., para. 98.
280 Ibid., para. 99.
281 Ibid., para. 106 ff.
282 Ibid., para. 109.
283 Ibid., para. 113.
284 See Chapter 18 1.2.2.

considered "injured" in comparison to other States. The ICJ also did not explicitly deny Myanmar's qualification of Bangladesh in this way, but merely stated that The Gambia's position was not subsidiary to that of Bangladesh.

3.2 *Regional Human Rights Courts and Commissions*

3.2.1 Inter-State Procedures

Most of the Regional Human Rights Charter provide the possibility for Member States (and individuals, as discussed later) to submit complaints against another State party before a regional human right court or commission.[285] For example, the European Court of Human Rights (ECtHR) is competent to receive and examine inter-State complaints.[286] According to Article 33 ECHR "[a]ny High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party." Thus, the right to bring inter-State (or individual) complaints to the Court does not depend on any specific act of acceptance. Where the case is considered by the Court as admissible, the Chamber will conclude it by the means of a binding and final judgement. Any party to the case can (within three months) request that the case shall be referred to the Grand Chamber. When the request is (exceptionally) accepted, the Grand Chamber will then decide on the case with a final judgment (Articles 43–44 ECHR). The execution of the judgment of the ECtHR is supervised by the Committee of Ministers of the Council of Europe (Article 46 ECHR).[287]

Inter-State complaints are also provided by the African and Inter-American Human Rights Charter, but the procedures are more complex: The African Commission on Human and Peoples' Rights has, according to Article 30 AfCHPR, not only the function to promote the human and peoples' rights of the Charter, but also to protect these rights, which include the right to receive communications from States and to interpret the provisions of the Charter at the request of a State Party (Article 45 AfCHPR).[288] When "all appropriate means

285 The Arab Charter of Human Rights currently lack an enforcement mechanism. The Charter has however established a process where the Committee receives and reviews State reports, which have to be submitted every three years by the respective States. Based on its review, the Committee can make recommendations if appropriate. For more information, see MERVAT RISHMAWI, Open Society Foundations and the Cairo Institute for Human Rights Studies, 'The League of Arab States Human Rights Standards and Mechanisms: Towards Further Civil Society Engagement – A Manual for Practitioners,' 2015.

286 OHCHR, p. 89.

287 KÄLIN/KÜNZLI, p. 269 ff.; OHCHR, p. 100 f.

288 The inter-State procedure is stipulated in the AfCHPR as follows: Any State party can, if it "has good reasons to believe that another State Party to this Charter has violated the

to reach an amicable solution" fail, the Commission will transfer a report with its findings and where appropriate, with recommendations to the Assembly of Heads of State and Government (Article 52 and 53). Whether further steps have to be taken, is then decided by the Assembly. But the Commission does not provide binding decisions to the State Parties.[289] The Commission or the States who are parties to the protocol of the Court and have lodged a complaint to the Commission (or against whom a complaint has been lodged) can also make an application to the African Court on Human and Peoples' Rights, which complements and reinforces the functions of the African Commission on Human and Peoples' Rights.[290] The Court's decisions are final and binding on the State parties.[291] For the sake of completeness it should be mentioned that there is also the possibility that Member States can (without participating at the Commission's procedure) submit their application directly to the Court. But since this is only possible if their own citizens are concerned,[292] which is not the case for situations where non-belligerent States enforce the law for arbitrary withholding of consent to relief where the affected victims are nationals of another State, this option is not relevant here.

The inter-American system for the protection of human rights comprises obligatorily two instances: The Inter-American Commission on Human Rights has to first consider a matter, before the Inter-American Court of Human Rights can examine a case on request of either of the involved States parties or the Commission (Article 61 ACHR). For an inter-State complaint procedure to

provisions" draw the attention of that State to the matter (Article 47). The State to which the communication is addressed can submit a written explanation. When the matter can not be "settled to the satisfaction of the two States involved," either State can bring it to the attention of the Commission (Article 48). Independent of these provisions, a State party can also refer the matter directly to the Commission (Article 49), see on the whole OHCHR, p. 75 and 76.

289 OHCHR, p. 76.

290 See Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and People's Rights (hereafter Protocol of the African Human and Peoples' Rights Court), available at http://www.african-court.org/en/images/Basic%20Documents/africancourt-humanrights.pdf (31 August 2023).

291 For the sake of completeness, is must be mentioned that Member States of the Organisation of the African Unity (OAU) can also request from the court an advisory opinion, see Article 4 of the Protocol of the African Human and Peoples Rights Court. On the inter-State procedure before the African Commission and Court on Human and Peoples' Rights, see homepage of the African Commission on Human and Peoples' Rights, available at https://achpr.au.int/en/communications-procedure (last visited 31 August 2023).

292 See Open Society, Justice Initiative, Factsheet African Court on Human and Peoples' Rights, available at https://www.justiceinitiative.org/publications/african-court-human-and-peoples-rights (last visisted 31 August 2023).

come before the Commission and the Court, it is required that both the concerned States have made an explicit declaration to recognise the competence of the Commission to examine inter-State communications (Article 45 ACHR) and accepted the Courts jurisdiction (Article 62 ACHR). The Commission will draw up a report with its conclusion and submit it to the States parties. If, after a prescribed period, the contentious matter has not been settled or submitted to the Court and the State concerned fails to take "adequate measures," the Commission can decide to publish its report (Article 50 and 51 ACHR). The case can be submitted either by the Commission or the State parties to the Court (Article 61(1) ACHR). In that case, the Court's judgments are the final decision and the States parties undertake to comply with the terms thereof (Articles 67 and 68 ACHR).[293]

What all these procedures have in common is that in order to submit an application to the respective Court or Commission, all domestic remedies have to be exhausted. Exceptions to this admissibility criteria include situations where no effective remedy is available for the concerned individuals at national level.[294] This requirement can be met easily in situations of armed conflicts where there is no properly functioning national judicial system. This is particularly true for situations of humanitarian crisis, where the concerned civilian population already lack essential goods to survive. The national judicial system, at least in the affected area, will be affected to such an extent that nothing should stand in the way of a direct inter-State complaint before a regional human rights court or commission against the arbitrary withholding of consent to relief actions.

It should be noted that inter-State application procedures are in general less applied before human rights courts and commissions than individual complaints. For example, until today, States have referred to the ECtHR (including the former Commission) in only 24 situations, compared to over 750,000 individual applications submitted to the ECtHR. Inter-State procedures can have nevertheless a significant impact in situations such as armed conflict where many individuals are affected and there is a need for general clarification.[295]

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293 OHCHR, p. 87 ff.

294 The exhaustion of domestic remedies rule is not applied according to Article 50 AfCHPR when "the procedure of achieving these remedies would be unduly prolonged." According to Article 46 IACH this requirement is not applicable inter alia, "where the alleged victim has been denied access to domestic remedies"; and (c) where there has been "unwarranted delay in rendering a final judgement." Similar findings have been provided by the ECtHR in its practice.

295 This is particularly true, since there are no mass complaint procedures standardly provided by international law, as mentioned later under remedies for individuals.

In the last years, there has been an increase of State-to-State litigations before the ECtHR concerning armed conflicts.[296]

Finally, it is worth mentioning, that the possibility for States to invoke breaches of fundamental human rights violations in another State through inter-State complaints before regional human rights courts based on the *erga omnes* character of the affected rights has been explicitly stated by the ICJ in its Barcelona Traction judgment in 1970:

> the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim.[297]

3.2.2 Enforcement of IHL

With regard to the breaches of IHRL in the context of non-international armed conflicts, the question whether regional judicial human rights bodies can address breaches of IHL within the IHRL complaint procedures arises. In particular, whether such courts and commissions can refer in instances of arbitrary withholding of consent to relief during non-international armed conflicts, as well as the obligation of the concerned State to provide and enable the provision of relief based on IHL. The practice of regional human rights courts and commissions shows that they have enforced at several instances IHL provisions applicable to non-international armed conflict in individual and States initiated human rights complaint procedures.[298]

The Inter-American Commission on Human Rights has adopted in the past the most generous attitude in that respect: it applied IHL directly in the context of the IHRL complaints and condemned violations against Common Article 3 and AP II.[299] The Commission addressed its competence and argued that the direct application of IHL enhances its ability to respond to situations

296 In the last years, there are predominant cases concerning the Ukraine/Russia conflict, see on this the list of inter –State applications to the ECtHR, available at https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf (last visited 31 August 2023); on the overall topic, see Ulfstein/Risini, EJIL Talk Blog.

297 ICJ, *Barcelona Traction, Light and Power Company, limited, Bellgium v. Spain*, para. 91; see on this ULFSTEIN/RISINI, EJIL Talk Blog.

298 SIVAKUMARAN, Non-International Armed Conflict, p. 500.

299 For example, Inter-American Commission of Human Rights, *Avilan et a v. Colombia*, para. 202 or *Lucio Parada Cea et al v. El Salvador*, para 82; see SIVAKUMARAN, Non-International Armed Conflict, p. 501 with further references.

of armed conflict since the ACHR is not designed to regulate situations of armed conflict.[300] The absence of a legal basis for such an interpretation led to the decision of the Inter-American Court on Human Rights in 2000, that neither it nor the Commission has the competence to apply IHL directly. The Inter-American Commission and Court may, however, use IHL as a standard of reference for interpretation of provisions of ACHR in situations of armed conflicts.[301] The Court suggested later in a following case that the Court is nevertheless entitled to 'observe' in connection with a violation of the ACHR whether there are also violations of other international instruments, such as of the Geneva Conventions.[302] But such observations will remain legally without (at least direct) consequences for the concerned States.[303]

The African Commission on Human and Peoples' Rights has also directly applied and enforced IHL. It argued that on the basis of Article 60 and 61 of AfCHPR, that inspiration can be drawn from other international law instruments and such instruments can be used to determine principles of law, IHL could be taken into consideration to determine a case.[304] The mentioned legal basis does, however, not allow the direct enforcement of IHL. The competence of the Commission to directly condemn violation of IHL provisions within IHRL procedures is therefore doubted in the doctrine. The African Court on Human and People's Right, in contrast, has a clear mandate not only to enforce the AfCHPR, but any human rights instruments that are binding for the concerned State,[305] which include undisputedly IHL instruments. The African Court has however, until today, not decided directly on the basis of IHL.

In contrast to the Inter-American and African approach, the ECtHR is (like the European Commission on Human Rights before[306]) still reluctant

300 Inter-American Commission Report No. 55/97, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, October 30, 1997, p. 44, para. 161; see ZELGVED with further references, (remedies for individuals for violation of IHL), p. 515.

301 Inter-American Court of Human Rights, *Las Palmeras v. Colombia*, paras 32–34 and paras 205–210; see for an in-depth analysis of this issue SIVAKUMARAN, Non-International Armed Conflict, p. 501 ff.; ZELGVED, p. 515 ff. and KALSHOVEN, Cases of Inter-American Court of Human Rights, p 259 ff.

302 Inter-American Court of Human Rights, *Bamaca-Velasquez v Guatemala*, paras 208–209.

303 See also view of SIVAKUMARAN, Non-International Armed Conflict, p. 503.

304 African Commission on Human and Peoples' Rights, Communication 227/1999, DRC/Burundi, Rewanda, Uganda, 20th Report of the African Commission on Human and Peoples' Rights, EX.CL/279(IX), paras 70 and 78.

305 Article 28 Statute of the African Court Human and Peoples' Rights.

306 For example, in an inter-State complaint against Turkey, Cyprus invoked IHL rules before the European Commission on Human Rights. The European Commission did not, however, examine this point, European Commission on Human Rights (4 EHRR 482 at 552, 553,1976, Commission Report), hereto ZELGVED, fn. 75 with further references.

to involve condemnation of IHL violations in its findings. On several occasions, humanitarian law has served as a source of guidance for interpretation of IHRL provisions "by reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict,"[307] but no explicit condemnation of violations of IHL provisions are made in the judgements.[308]

Thus, at proceedings of arbitrary withholding of consent to relief in situations of non-international armed conflict, only the African Commission and Court on Human and Peoples' Right may also enforce IHL and refer explicitly to possible breaches of IHL in its judgement. The Inter-American Commission and Court on Human Rights has the possibility to determine violations of IHL as observations, while the ECtHR would consider IHL only as a source of guidance for interpreting the affected IHRL provisions.

3.3 *International Criminal Court (ICC)*

The International Criminal Court (ICC) represents a potential way for holding to account the individuals who are responsible for the arbitrary withholding of consent to relief. The ICC complements the existing national judicial systems. Accordingly, it will step in only if national courts are unwilling or unable to investigate or prosecute (principle of complementary, Article 17 of the Rome Statute).[309] The Office of the Prosecutor of the ICC conducts investigations upon referrals by States who have ratified the Rome Statute or when it decided by the United Nations Security Council on a binding decision or on its own initiative and with authorisation of the judges.[310] An important condition to prosecute against State officials is provided by Article 27(2) of the Rome Statute

307 In the case *Hassan v. the United Kingdom*, the ECtHR stated regarding a detainment of an Iraqi by the UK that the Geneva Convention and the European Convention provide safeguards from arbitrary detention during armed conflicts and that the grounds of permitted deprivation of liberty according to Article 5 should be accommodated, as far as possible, to the taking of prisoners and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions (para. 104 and 105).

308 See on this ZELGVED, p. 519 and fn. 75 with further examples.

309 FORD, p. 9; The principle of complementary is also anchored in Article 17 of the Rome Statute and will be, as mentioned before, met in situation of arbitrary withholding of consent during armed conflicts, particularly if the withholding is committed by State authorities.

310 Also, all the other admissibility requirements such as that prosecutor have reasonable belief that a crime within the jurisdiction of the Court has been committed and investigation would not serve the interests of justice, or sufficient gravity of that act (Article 17 and 53 of the Rome Statute) are met in a situation of arbitrary withholding of consent to relief during armed conflict.

which removes the immunity of those officials.[311] For an accused to be found guilty, the material elements and elements of individual criminal responsibility have to be met. According to Article 30 of the Rome Statute "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge." According to Article 66(3) of the Rome Statute, this requires a proof beyond reasonable doubt. This is a very high threshold in general, but in particular for cases of arbitrary withholding of consent, where members of the State authority or non-State armed groups responsible for impeding humanitarian relief are unwilling to disclose their intent and knowledge.[312] The required intention and knowledge in such instances should include beside the act of withholding consent to relief, the action and the potential consequences which are characteristic for the respective criminal act.[313] Where a clear confession is absent, it has to be concluded from given factual circumstances such as the general political doctrine which gave rise to the specific act or omission. But even if an intent may be proven in general for the government of a State or an armed group, in order to criminally punish individually an official or a member of the armed group, the established intention has to also be attributed to the individual perpetrators. In this regard it can be assumed, that the closer an individual stands with the decision-taking hierarchy of a government or an armed group with the respective intention, the more likely it will be that the knowledge existed, and the respective intention was also supported by the perpetrator.[314]

To date, there have been no allegations against individuals at the ICC for committing a war crime, a crime against humanity or a genocide crime based on denying humanitarian relief to civilians in need. But the ICTY for example, was, for example, confronted with certain cases where food and other vital services were withheld from inmates in detention centres and which were brought under the heading of "wilfully causing great suffering or serious injury to body or health," "cruel treatment" and "inhuman acts."[315] The ICTY did, however,

311 This topic was particularly discussed with regard to the vertical removal of immunity in the case where the arrest and surrender of Al-Bashir by Jordan was not provided, see on this AKANDE/DE SOUZA DIAS, EJIL Talk Blog; see also AKANDE, EJIL Talk Blog.

312 A particularly difficult intention to prove is the intention of genocide, see BARTELS, p. 291, 294 f.

313 Hereto also ROTTENSTEINER, p. 565.

314 Regarding an intention of a group in general and of an individual, see, ROTTENSTEINER, p. 564.

315 For example, ICTY, *Prosecutor v. Dragan Nikolic*; and also ICTY, *Prosecutor v. Milorad Krnojelac*; on this topic, see GILLARD, p. 34.

not apply those instances of denial to humanitarian relief as a basis for sentencing. Acts which were mentioned for causing the wilful killing or murder were shootings, mutilations and the like, even though instances of denial of relief were applied widely and were also well-documented. It is assumed in the doctrine that in view of the limited time and resources available, the Tribunal must have considered other violations as more serious and the relationship between the offence and the consequences in those cases as easier to prove.[316] In a precedent, the ICTY commented nevertheless an instance of blocking of aid convoys and found that it constituted a crime of inhuman acts,[317] (which is similar to the crime against humanity according to the Rome Statute).[318]

The practice of the ICTY shows that the additional elements which have to be proved in order to address withholding of consent under the existing crimes places a considerable limitation on the ability of a court to consider it as an act of crime.[319]

316 On the overall topic, see ROTTENSTEINER, p. 559 and 565.
317 ICTY, *Prosecutor v. Radislav Kristic*, para. 653.
318 FARQUHAR, p. 37.
319 BARTELS, p. 305.

CHAPTER 19

Remedies for Civilians

The affected civilian population enjoy – as outlined before – access to humanitarian relief based on several rights enshrined in IHRL and IHL. Thus, when consent to relief actions is withheld arbitrarily and civilians are deprived of those rights, they can claim the breaches of those rights as victims if there are respective remedies provided.[1] As pointed out by ZEGVELD with regard to the legal position of civilians in armed conflicts:

> recognition of rights is one thing, the right to claim those rights is another.[2]

While there are different possibilities for civilians to invoke breaches of IHRL before international fora, particularly international and regional human rights conventions often provide victims of human rights breaches with the possibility of individual complaints before human rights bodies or courts (1), humanitarian law treaties, such as the Geneva Conventions and its Protocols, do not expressly envisage an international mechanism for civilians to claim the breaches of their rights.[3] However, as outlined before, some human rights commissions and courts may fill this gap by referring explicitly or making

1 Neither IHRL nor IHL treaties provide a general definition of the notion of 'victim'. The UN Principles on Remedy and Reparations (see following fn. 1240) state that "A person is 'a victim' where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights."

2 ZEGVELD, Remedies, p. 497.

3 In view of this gap, the UN Commission on Human Rights adopted at its 56th session in 20008 the "Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law," which recognises in general a right to remedy for victims violations of human rights and IHL. Eventhough these Principles are of non-binding character, they are recognised and respected by the Member States. The content of the provided right to remedy includes access to justice, right to reparation for the harm suffered by the breach of law and access to information concerning the violations, which has to be guaranteed by the Member States within their national legislation, see on this ZEGVELD, Remedies, p. 497; The obligation to pay compensation for violations laid down in IHL is an obligation to pay compensation to the State to which the individual injured persons belongs and does not provide a right to an individual to claim compensation, see SASSÒLI, State responsibility, p. 418 ff.

non-binding observations of violations of IHL within IHRL complaint procedures. In recent years, there were also international claim commissions set up which provided remedies to victims of violations of IHL.[4] Since such commissions are normally set up in the aftermath of an armed conflict in order to deal with breaches that happened during the conflict, they are not an option for civilians in situations where consent to relief is withheld during an ongoing armed conflict and thus, don't actually fall within the scope of the present book. But while individual remedies under IHRL treaties only enable that one or a (defined) group of individuals may invoke breaches of law, claim commissions include the possibility of mass complaints for civilians. This mechanism is arguably a more suitable remedy for situations such as armed conflicts, where countless persons are affected by a wrongful act of a conflict party.[5] Because of this particularity, claim commissions deserve nevertheless a mention later (2).

Finally, where arbitrary withholding of consent constitutes a crime according to the Rome Statute, affected civilians have the possibility to participate as victims at criminal proceedings before the ICC (3).

For the sake of completeness, it should be noted that violations of IHRL, IHL and also the Rome Statute can also be presented by individuals before their own national courts.[6] In order not to overload the international fora and to ensure the integrity of national jurisprudence, most international complaint procedures require that domestic remedies be exhausted before the complaint is presented before the international body, unless it appears that such remedies are ineffective or unreasonably prolonged.[7] National courts can be more efficient for the enforcement of international law since those courts have easier access to evidence, testimony or investigation. Proceedings can therefore be held relatively swiftly. Further, national rulings have the advantage of not being perceived as an external pressure or intervention. However, a process before the national courts of the affected State requires a proper functioning of

4 ZELVGED, p. 521.

5 ZELVGED, p. 522.

6 If the international rules are not adapted to domestic law, international law can also be directly referred, if it is directly applicable in the respective legal system and the rules concerned are self-executing, see on this SASSÒLI, p. 419 with further references.

7 For example, Article 1 of AP 15 to the ECHR introduced the principle of subsidiarity in the preamble to the ECHR. Accordingly, "the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention"; see on thisKÄLIN/KÜNZLI, p. 268.

the internal legal system, which will be mostly impaired in situations of armed conflicts, particularly depending on how long the conflict has been going on.[8] In such situations, individuals have the possibility to refer to the ineffectiveness of national procedures for presenting their communications before international bodies.

1 Human Rights Complaint Procedures

> [t]he ability of individuals to complain about the violation of their rights in an international arena brings real meaning to the rights contained in the human rights treaties.[9]

There are different international remedies for individuals to claim unlawful conduct by State authorities with regard to human rights provisions. The most important and frequently used ones are the communications before UN treaty bodies (1.1) and the individual complaint procedures before regional Human Rights Courts (1.2). These procedures enable civilians to claim the end of persistent human rights violations. Further, it is not fully clarified whether individuals also have a general right to reparation for the committed violations for all complaint procedures (1.3).

As far as it is known, to date no individual human rights complaints have been filed regarding the withholding of consent to relief operations before one of those human rights bodies.[10] Considering the formal requirements which are required for an individual to file a case and also the time period, which such procedures can take (it may take several years before a final decision is reached) individual complaint procedures seem, at least during a situation of arbitrary withholding of consent, not to be an appropriate enforcement tool for individuals facing immediate risk to their basic rights.[11] The following

8 For an in-depth discussion on this subject, see Sharon Weil, 'Building respect for IHL through national court,' in: International Review of the Red Cross, Volume 96, No. 895/896 (2014), pp. 859–879.

9 UN Human Rights Office of the High Commissioner, see on its website https://www.ohchr.org/EN/HRBodies/Petitions/Pages/Index.aspx (last visited 31 August 2023).

10 Searches of jurisprudence considering individual complaints from individuals: Jurisprudence database of UN treaty bodies see https://juris.ohchr.org (last visited 31 August 2023).

11 In cases where there is a threat of acute, serious and irreparable harm to the complainant, (which will be the case in situations of arbitrary withholding of consent where the affected civilians face imminent threat to their survival) the bodies called can also be asked, where they have the respective legal power to pronounce precautionary actions.

individual procedures are nevertheless mentioned, since they can theoretically be remedies for breaches of rights in connection with arbitrary withholding of consent.

1.1 *Communications before UN Treaty Bodies*

Most of the UN human rights treaties provide individuals with the right to communicate before the respective treaty body. Civilians of the affected State can refer to those procedures if the concerned State has made an explicit declaration to that effect under a specific article of the Convention or has ratified or acceded to the optional protocol where such a procedure is foreseen.[12] The procedures before these committees are more or less similar: if a complaint is registered, the State Party concerned will be notified and invited to submit its opinion. Subsequently, the complaining party has the opportunity to submit its reply. The decision-making process is quite complex, including drafting and consulting. Once the decision is taken, there are also certain follow-up procedures set up to ensure implementation.[13]

Even though the decisions of the committees are not legally binding judgments but non-binding views, the committee's findings are in terms of form and authority nevertheless similar to a court ruling and have therefore significant importance. In view of the States treaty obligations and their acceptance to such procedures, it seems also coherent that they comply with these decisions or at least have to provide convincing reasons when they choose not to implement them.[14]

1.2 *Regional Human Rights Courts*

On a regional level, individual complaints concerning arbitrary withholding of consent to relief operations may be invoked before regional human rights commissions and courts where such remedy is provided by the respective Charter. The admission of individual complaints is subject to several admissibility requirements, including the requirement of exhaustion of national

12 For example, complaints before the Human Rights Committee (CCPR) for violations of the human rights set forth in the ICCPR are possible based on the First Optional Protocol to the ICCPR, the Committee against Torture (CAT) for breaches of the Convention against Torture and Other Cruel. This requires that the concerned State has made a declaration under article 22 of the Convention, Inhuman or Degrading Treatment or Punishment or the Committee on Economic, Social and Cultural Rights (CESCR) concerning individual communications alleging violations of the ICESCR based on the Optional Protocol to the Covenant, more hereto KÄLIN/KÜNZLI, p. 249 ff.

13 In detail on the proceedings before the CCPR, see Kälin/Künzli, p. 262 ff.

14 KÄLIN/KÜNZLI, p. 251 and 266 f.

remedies. In this regard, reference can be made to what has been mentioned for Inter-State communications before those bodies.

Individual complaints are, for example, possible before the ECtHR for violating the human rights set forth in ECHR. The ECHR stipulates in Article 13 not only that individuals whose rights are violated shall have "an effective remedy before a national authority," but provides in Article 34 that any person or group of individuals can submit a complaint to the ECtHR against a Member State. As for the inter-State communication, the judgment of the Chamber of the ECtHR is binding and final, if it is not under exceptional circumstances requested that the case shall be referred to a Grand Chamber. In that case, the Grand Chamber will decide the case by a judgment that is final (Articles 41–44 ECHR).

The High Contracting Parties "undertake to abide by the final judgment of the Court in any case to which they are parties"; the execution of the final judgment is supervised by the Committee of Ministers of the Council of Europe (art. 46).[15]

The AfCHPR does not explicitly provide that the African Commission on Human and Peoples' Rights has the competence to deal with individual complaints. Individuals can nevertheless make communication to the Commission, but they have no enforceable right that their communication is dealt by the Commission.[16] According to Article 55(1) of the Charter, the Commission's Secretary has to "make a list of the communications other than those of States Parties (…) and transmit them to the members of the Commission, who shall indicate which communication should be considered by the Commission." The communication will then be brought to the attention of the State concerned (Article 57 AfCHPR) and "when it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights," – which could be the case in situations of communications concerning arbitrary withholding of consent to relief – the Commission can draw the attention of the Assembly of Heads of State and Government to these particular cases. The Assembly may then request the Commission "to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations" (Article 58 (1) and (2) AfCHPR). When the situation of arbitrary withholding of consent is considered by the Commission as an emergency case, it can also submit the case

15 OHCHR, p. 100 f.; ZEGVELD, Remedies, p. 497.

16 KÄLIN/KÜNZLI, p. 277.

based on the Article 58 (3) AfCHPR directly to the Chairman of the Assembly, "who may request an in-depth study."[17] Provided that the concerned State has acknowledged the Court's competence, a case can be further submitted to the African Court on Human and Peoples' Right by the Commission, the concerned State itself and the State whose nationals are victims of a violation of the respective human rights. Individuals are entitled to appeal to the Court only if the concerned State has granted that competence to the individual by means of an additional declaration.[18] Individuals have under these conditions also the right to apply directly to the Court, after the national remedies are exhausted.[19]

The right of individual petitions to the Inter-American Commission on Human Rights is (in contrast to the possibility of inter-State communications before the Commission) provided mandatory under the ACHR and does not require a specific declaration of the concerned State acknowledging the competences of the Commission. According to Article 44 ACHR, any person or group of persons may lodge petitions containing denunciations or complaints of violations of the Convention by a State Party.[20] The individual petition procedure before the Commission is similar to the inter-State communication: The Commission is competent to draw a non-binding report with its "opinion and conclusions concerning the question submitted for its consideration," which can be published when the concerned State fails to take adequate measures (Article 50 and 51 ACHR). But in contrast to the inter-State communication, the complaining party in the individual complaint procedures does not have a right to submit the case to the Inter-American Court of Human Rights. According to Article 61 ACHR, only State parties and the Commission have the right to submit a case to the Court. Individuals are only allowed to request the Commission for a transfer of the case to the Court, which limits their possibility to actively act. The limited rights of individuals in this regard is also considered in the doctrine to be (at least partially) the reason, why the Inter-American Court has dealt with until today only a few individual complaint cases compared to other regional human rights courts.[21] However, when a case is submitted to the Court, the Court's judgment is final and the concerned State party must comply with the terms thereof (Articles 67 and 68 ACHR).

17 OHCHR, p. 76 f.
18 Article 5(3) and Article 34(6) Additional Protocol/AfCHPR.
19 On the whole, see KÄLIN/KÜNZLI, p. 278.
20 OHCHR, p. 88.
21 Hereto KÄLIN/KÜNZLI, p. 277 and fn. 145.

1.3 *A General Right to Reparation?*

A right to reparation for human rights violations is in certain human rights conventions explicitly provided. For example, Article 14 CAT requires State Parties to ensure in their legal system "that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." According to Article 39, CRC States Parties "shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts." Obligations of compensation can be further also found in international and regional general human rights conventions such as in Article 9 CCPR or Article 5 ECHR.[22]

Beside these treaty rights to reparation, it is questionable whether victims of human rights violations also have a general right to reparation under customary law. Proponents of a such a right in the doctrine justify it by the fact that a right to effective complaints, as provided for example in regional human rights conventions, cannot be understood only as a right of access to a complaint body, but must be understood more comprehensively and should also include a right to reparation, since a complaint can only be considered as effective if the body addressed has the possibility to grant reparation.[23] This view is also supported by the "Basic Principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of humanitarian law" (hereinafter UN Principles and Guidelines on Remedy and Reparation), which were unanimously adopted by the UN General Assembly in 2006.[24] As indicated in the preamble of these Principles and Guidelines, they "do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms." In this regard, the UN Principles and Guidelines on Remedy and Reparation state that remedies of individuals for gross violations of IHRL and serious violations of IHL include beside the victim's right to equal and effective access to justice, the right to adequate,

22 On the overall topic, see KÄLIN/KÜNZLI, p. 225 f.

23 KÄLIN/KÜNZLI, p. 226; an inclusion of reparation within the right to remedies is also reflected in para. 11 of the UN Principles and Guidelines on Remedy and Reparation.

24 UN GA Resolution 60/147.

effective, and prompt reparation for the harm suffered as well as access to relevant information on the violation and reparation mechanisms.[25]

A general right to compensation based on the right to an effective remedy is also agreed in practice by certain international bodies. For example, UN treaty bodies call upon in a constant practice the contracting States to provide compensation or other reparations to the persons affected based on the obligation to provide an effective remedy. For example the CCPR state in the *Case Korol v. Belarus* that "[p]ursuant to Article 2(3)(a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated;"[26] Some regional human rights courts have also the power to award compensation for victims themselves.[27] The Inter-American Court of Human Rights refer to international customary rules on State responsibility to order the payment of compensation to victims of human rights abuses. It stated in the case *Rochela Massacre v. Colombia* that "it is a principle of International Law that any violation of an international obligation which causes damage give rises to a duty to make adequate reparations. The obligation to provide reparation is regulated in every aspect by International Law."[28]

Against that background, it can be argued that there are substantial evidence of common conviction of law and practice within the international community with regard to the right to reparation, particularly in view of a right to an effective remedy, and it can be agreed that individuals affected by human rights violations also enjoy a general right to reparation under international customary law. According to the UN Principles and Guidelines on Remedy and Reparation, such a right to reparation includes restitution, compensation, rehabilitation, reparation, and a guarantee of non-repetition.[29]

2 Claims Commissions

Two known examples of claims commissions which recognised the right of civilian victims to invoke violations of IHL are the UN Compensation Commission

25 Principle 11 of UN Principles and Guidelines on Remedy and Reparation.

26 CCPR, *Korol v. Belarus*, 2089/2011 (2016), para 9; on the whole KÄLIN/KÜNZLI, p. 226.

27 For example, the ECtHR based on Article 14 ECHR.

28 Inter-American Court of Human Rights, *Rochela Massacre v. Colombia*, Judgement of 11 May 2007, Series C, No. 163, para. 226; see in this respect, OHCHR, p. 73.

29 Principle 18 UN Principles and Guidelines on Remedy and Reparation; On the extent of the right to reparation see also KÄLIN/KÜNZLI, p. 226 f.

(UNCC), and the Eritrea-Ethiopia Claims Commission (EECC). The UNCC was established by the UN Security Council in 1991 in order to implement Iraq's liability for the unlawful invasion and occupation of Kuwait in 1990 and 1991.[30] The Security Council considered Iraq as liable, inter alia under IHL, "for any direct loss, damage (…), or injury" which was caused to foreign Governments as well as to individuals "as a result of Iraq's unlawful invasion and occupation of Kuwait."[31] Thus, liability was drawn not only between States, but also towards individuals and the vast majority of the claims received were from individuals.[32] In 2000, the EECC was established by the Eritrea-Ethiopia Peace Agreement with the aim to decide on claims "for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict (…), and (b) result from violations of IHL, including the 1949 Geneva Conventions, or other violations of international law."[33]

The procedures for individuals before such commissions are similar: individuals have the right to initiate the proceedings by either submitting their claims directly to the respective commission or to the government, which will transfer them to the commission. The commissions will deal with a certain violation and will typically implement monetary compensation to the victims proportionate to the gravity of the violation.[34]

As mentioned before, claims commissions provide individuals with the possibility of mass claims. Even though in mass claims the involvement of individuals in the process is limited (after submitting the claims they take no further part in the proceedings, unless it is requested by the respective commission), they nevertheless represent the most appropriate mechanism for civilians affected by an act during an armed conflict. The breach of law is often committed on a large scale and will concern an undefined number of persons. This also true for situations where consent to relief is arbitrarily withheld. The more

30 ZELVGED, p. 521.

31 SC Resolution 687 (1991), para. 16.

32 Most of the 2.7 Mio received claims were from individuals, 7,000 claims have been filed by corporations, and only around 300 by governments; from former UNCC's website that is no longer in operation.

33 Agreement Between the Government of the Federal Democratic Republic of Ethiopia And the Government of the State of Eritrea, Art. 5, para. 1, available at https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/eritrea_ethiopia_12122000.pdf (last visited 31 August 2023). On the overall topic, see ZEGVELD, Remedies, p. 521 f. with further references.

34 ZEGVELD, Remedies, p. 522.

extensive a violation of IHL is, the greater is the number of victims and potential complaints. In individual complaint procedure, judicial bodies (irrespective whether they involve nationals of the concerned State or international bodies) must decide on a case-by-case basis, which requires an enormous amount of resources and can overwhelm their capacity. Claims commissions with the possibility of mass claims are therefore better equipped to deal with situations of mass violation.[35]

Since claims commissions are normally set up in the aftermath of an armed conflict, acute situations of humanitarian crisis where consent to relief is withheld arbitrarily cannot be claimed by the affected civilians. Another problem is also that this type of procedure is established ad hoc and dependent on political will.[36] Thus, where political feasibility is not given, this remedy is not given for victims even in the aftermath to a conflict.

3 Rights as Victims before the ICC

One of the most innovative developments which the establishment of the ICC brought (unlike the ICTY and ICTR) is the recognition and regulation of the rights of victims at the proceedings of the Court.[37]

The Rome Statute does not provide a definition of the notion of victim for criminal proceedings. However, Rule 85 of the ICC Rules of Procedure and Evidence (RPE), states that for the purposes of the Statute, victims are "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."[38] In this respect, "harm" is interpreted by jurisprudence in reference to the UN Principles and Guidelines on the Right to Remedy and Reparation[39] broadly, including physical or mental injury,

35 ZEGVELD, Remedies, p. 522 f.

36 ZEGVELD, Remedies, p. 523.

37 At the ICTY and ICTR the victims were not considered part of the proceedings, their participation was limited to testifying as witnesses, for more information on this, see GONZÁLEZ, p. 20.

38 A similar definition is provided by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which defines victims of crime as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power" (Principle 1); see on the whole OLÁSOLO/KISS, p. 127 f.

39 UN GA Resolution 60/147, Principle 8: "For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental

emotional suffering or economic loss, either suffered individually or collectively, where there is a causality link between the alleged harm and a crime which falls within the jurisdiction of the Court.[40] Thus, civilians who have suffered physical and mental harm as a consequence of deprivation of relief that constitutes a crime under the Rome Statute, are as victims entitled to rights before the ICC.[41] On the one hand, this includes the right to participate at the proceedings (3.1), and on the other hand, the right to seek reparation (3.2).

3.1 *Participation at the Proceedings as Victims*

According to Article 68(3) of the Rome Statute, victims can present their views and concerns during the judicial proceedings. The effective timing and manner of the victims' participation is determined by the judges depending on the stage of the respective proceedings. Participation may be requested by affected individuals through a standard written application (to be distributed in the locations where the Court conducts investigations) to the Registrar of the Court, in which they must express their intention to participate and the reasons why they should be recognised as victims.[42] Since affected civilians may not have the required access and ability to fill such forms, which is particularly true in situations of ongoing armed conflict and in villages where the majority of people are illiterate, it is the Registry's duty to either assist those victims to complete the forms or to provide education and training to those who work with the victims or groups of victims at the location of the crime.[43]

Based on the submitted application forms, the Court will determine who qualifies as victims (and who will be allowed to participate in the proceedings),

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injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation."

40 Aspects of the definition of victims have been the subject of controversy between different ICC Chambers, see OLÁSOLO/KISS, p. 133 f.

41 The rights of victims are acutally scattered throughout different pieces of legislation that govern the proceedings. The Statute, however, establishes the principal rights. Besides there are the Rules of Procedure and Evidence; the Regulations of the Court; and the Regulations of the Registry of the Court. Together, there are more than 115 provisions relating to the rights of victims and dictating precisely how the rights can be exercised and how the Court fulfils its mandate towards the victims, see on this GONZÁLEZ, p. 21, with further references.

42 GONZÁLEZ, p. 23.

43 GONZÁLEZ, p. 23.

and the appropriate manner of this participation. Even though victims have the right to participate and exercise their rights at all stages of the proceedings, in situations where a large number of victims are concerned by the alleged violation (which would include situations of arbitrary withholding of consent to relief), it has been established in the practice of the court that rather the lawyers representing the victims are invited to an active participation before the court.[44]

3.2 *Seeking Reparation*

As vicitims, the affected civilians can also claim reparations for the harm that they have suffered by the withholding of consent to relief operations. The right to seek reparation is provided by Article 75 of the Rome Statute, independent from the right of participation at the proceedings before the ICC. Thus, victims or groups of victims who did not participate in the Court's proceedings (for whatever reason) still have the right to request reparations at the end of the proceedings. There is also a standard form for the application, wherein victims have to provide information on the harm sustained and the type of reparations they request. According to Article 75 (1) of the Rome Statute reparations, the Court can award collective and/or individual reparations including restitution, compensation and rehabilitation.[45]

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44 Victims have the possibility to participate at the pretrial proceedings and can exercise their rights throughout all instances of judicial proceedings, for all stages, there are provisions in reference to the rights of victims, González, p. 24; see on this Articles 15(3), 19(3) and 82(4) of the Rome Statute.

45 González, p. 29.

PART 5

Legal Gaps and Required Developments

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CHAPTER 20

Introduction

Even though there are a number of possible options for the different actors involved in relief actions to act and hold conflict parties responsible for withholding consent to relief operations arbitrarily, until today there are only few records where this subject was addressed at international level.[1] This is particularly disturbing with regard to non-belligerent States, which have not only the right but also the duty to ensure respect for IHL. However, apart from the situation of Syria, where the Security Council had pronounced with Resolution 2165 (2014) the renunciation of the requirement of consent of the Syrian government for the cross-border relief actions, the issue of arbitrary withholding of consent has not been explicitly dealt with by other international instances in a binding decision, and also rarely in non-binding considerations. The reasons for this may be diverse.[2] May it be because non-belligerent States do not consider themselves as affected by the refusal of humanitarian relief in another State[3], or have no political motivation and resources to initiate a judicial or non-judicial enforcement.[4] But leaving those non-legal considerations aside, the existing uncertainty surrounding the legal provisions constitutes nevertheless a considerable obstacle to respond to situations of arbitrary withholding of consent. Further, the existing means to react on arbitrary withholding of consent are limited and not tailored for emergency situations like humanitarian crises, where the required relief is denied and urgent decisions have to be taken to save millions of lives. The international law lacks strong and functional international enforcement mechanisms, not only for non-belligerent States but also for the other actors. In order to effectively implement and enforce the prohibition of arbitrary withholding of consent, it is required to identify the existing legal gaps (Chapter 21) and to determine the needed legal developments which could close these gaps (Chapter 22).

1 Gillard, p. 35.

2 ICRC, Improving Compliance with International Humanitarian Law, p. 20 f.; Bangerter, p. 357; on the overall topic, see Heffes/Frenkel, p. 54.

3 Gillard, p. 34.

4 University of Oxford, Background Paper, p. 14.

CHAPTER 21

Currently Existing Gaps in the Law

1 Law Governing Humanitarian Relief

1.1 *No Comprehensive Legal Act*

The existing regulations for non-international armed conflicts in Common Article 3 and AP II are limited, and within those regulations there is very little dedicated to the provision of humanitarian relief and access to civilians in need. Most of the regulations which are required for the provision of relief have therefore to be derived from (unwritten) customary law of IHL and other legal sources. The absence of a comprehensive written legal act with all the relevant rules for the provision of humanitarian relief in non-international armed conflicts leads in the practice to a lack of comprehensive understanding of the existing rules. Such an understanding is particularly important for the conflict parties.

Even though armed forces of States and armed groups may have (at best) internal guidance and military manuals which also include regulations on relief operations, such regulations will be limited to certain provisions and will in general refer only (as they are made for the guidance of the behaviour of the respective actor) to the duties of the respective actor with regard to humanitarian relief. Thus, unmentioned are the rights and obligations of other actors involved in the relief. But in order to assess a situation correctly and react to it, a comprehensive picture of the rights and duties is required. These regulations will also not differentiate between international and non-international armed conflicts. It is therefore not enough when regulations on humanitarian relief are captured in internal regulations of the conflict party. It is rather required and in the interest of all actors involved in humanitarian relief, that there is a comprehensive written legal act on humanitarian relief, including the particularities of situations of non-international armed conflict. A set of all relevant rules for humanitarian relief would also be better accessible for the civilian population, which often has neither the required resources nor the knowledge to access different sources in order to understand their rights and duties with regard to humanitarian relief.

1.2 *Uncertainty about Applicability of IHL Regulations*

In order to apply the regulations on relief actions in non-international armed conflicts, it is required that there is certainty about the existence of

a non-international armed conflict. Affected States, however, are commonly reluctant to acknowledge that there is a non-international armed conflict on their territory.[1] During the drafting of AP II, it was emphasised by several States (based on the prevalent opinion at that time that non-international armed conflicts are internal affairs of the affected State) that it is solely a matter of the State which is affected by an armed conflict to decide whether the conditions for the applicability of the Protocol are fulfilled or not.[2] Even though today non-international armed conflicts are not anymore considered as purely internal affairs which exclude the opinion of the international community, the view of the affected State on whether there is an armed conflict on its territory or not is generally respected by the international community. This is also comprehensible, since such an assessment also requires knowledge about the factual circumstances in the country, which only the affected States will have, in contrast to the international community. But practice proves that in situations where international treaty monitoring or judicial bodies were called to make an independent assessment or decision on whether there was an ongoing armed conflict or not, those bodies have often come to a conclusion which was contrary to the view of the affected State. This shows that the decision on when the rules on non-international armed conflict are applicable should not be left purely to the discretion of the affected State. At the same time, to wait until an international treaty monitoring or judicial body makes an independent assessment will also delay the decision whether IHL is applicable.[3] The online portal 'Rule of Law in Armed Conflicts (RULAC)' project of the Geneva Academy of International Humanitarian Law and Human Rights tries to fill this gap by providing an independent and impartial classification of armed conflicts in the world, based on open source information, in a format that is accessible to a wide audience. Even though RULAC is used as legal reference by a broad audience, including legal experts, government officials, international organisations or NGOs,[4] its classification is non-binding for the concerned States. The absence of an international entity competent to make binding determinations on an ongoing internal armed conflict has been therefore often raised in the doctrine as an obstacle to the effective application of the relevant norms of non-international armed conflict.[5]

1 See on this ICRC, Improving Compliance with International Humanitarian Law, p. 20 f.; BANGERTER, p. 357; on the overall topic, see HEFFES/FRENKEL, p. 54.

2 ZEGVELD, Accountability, p. 12.

3 ZEGVELD, Accountability, p. 12 with further references.

4 See in this regard their website http://www.rulac.org/about (last visited 31 August 2023).

5 ZEGVELD, Accountability, p. 12 with further references.

1.3 *Uncertainty of the Content of the Regulations*

Another obstacle which may hinder the effective application of the existing regulations on relief operations during non-international armed conflicts may be the uncertainty about the content of the regulations. Certain issues which concern the provision of humanitarian assistance have not yet achieved consensus in the doctrine and practice. Particularly the requirement of consent is in many respects still uncertain, like for example whether the consent of the affected State is required if relief is to be provided in territory which is under the control of the armed group, or if it is to be proceeded in situations of failed State, whether, and if so when, consent may indeed be presumed because there is not a functioning government.[6]

The Geneva Conventions and the APs thereto, in contrast to other international law treaties, do not provide a treaty body where States Parties can meet on a regular basis in order to discuss the implementation of the regulations of these treaties. Questions on IHL are only taken up when there is a situation of emergency and discussed in ad hoc conferences, where there is a lack of expertise and time to engage in qualified examination.[7] Another option to clarify uncertain provisions in IHL is when they are addressed in a procedure before an international court or tribunal. However, such a process will take time and the decision might not answer to all the uncertain aspects of a regulation. Thus, as long as uncertain legal aspects are not addressed because of urgent circumstances in an international conference or are addressed before an international court or tribunal, legal questions with regard to IHL will remain unresolved. And even if they are addressed, it is questionable if they would provide satisfying answers with the required expertise and depth. It must therefore be concluded that the existing instruments for clarifying questions with regard to the uncertain contents of IHL regulations are insufficient in view of a legal body such as IHL, which is applied to situations which are fast changing and faces constantly new challenges.

1.4 *Absence of Regulations on Arbitrary Withholding of Consent*

In addition to the uncertainty about existing regulations, there is further the problem of absence of regulations on the problematic of withholding of consent. Arbitrary withholding of consent is not addressed in any of the existing legal regulations which are applicable to the provision of humanitarian relief. Even though there is general acceptance that consent to relief actions should

6 Van den Herik/Jägers/Werner, CAVV Advisory Report, p. 25.

7 On the whole, Pejic, p. 318.

not be withheld arbitrarily, and has been addressed by several resolutions of the General Assembly and the Security Council, it is required that the issue of withholding of consent is also addressed in an international treaty in order to create legal certainty. It should provide a legally binding definition and criteria on what amounts to arbitrariness and situations where withholding of consent to relief must be considered as arbitrary. It further also requires a section on what the consequences of arbitrary withholding are and what kind of actions can be taken by the actors affected by the arbitrary withholding of consent to relief.

1.5 *Difficult to Identify Arbitrariness*

In order to decide if a remedy can and should be taken in response to a withholding of consent to relief, it is necessary to establish that the withholding is effectively arbitrary. Even if legal regulations would provide criteria for determining arbitrariness, it is similar to the situation of armed conflict that for a proper decision an inside view of the factual circumstances is required. This task, however, cannot be fulfilled by the conflict party which is withholding the consent, nor by the opposing party, since they will not be able to make a neutral assessment. Since reactions to arbitrary withholding of consent have to be taken as quickly as possible in view of the need of the civilians for relief, assessment of arbitrariness cannot be taken on the path of judicial claims. The current situation therefore calls (similarly to the assessment of a non-international armed conflict) that an independent entity should be capable of deciding, at the moment when the consent to relief action is withheld, whether the consent is withheld by the conflict party arbitrarily or not.[8]

In view of the amount of relief action which is offered to a State in a humanitarian crisis, it is questionable how such an assessment could be realistically put in place. It is also doubtful if the concerned conflict parties would allow such an interference and accept an assessment by the international body as a binding decision. These challenges will be discussed in depth later. It is however important to note that even if an independent entity may assess a withholding of consent to relief as arbitrary, this would not lead to a right for the humanitarian actors to provide relief. Provision of relief will continue to require the consent of the conflict party.

8 Van den Herik/Jägers/Werner, cavv Advisory Report, p. 26.

2 Legal Status of Non-state Armed Groups

2.1 *Uncertainty about Adherence to International Law*

Even though it is generally agreed that armed groups, as parties to an armed conflict, have to respect IHL and IHRL, there is, however, little clarity on what their rights and duties are, particularly in the context of humanitarian relief. With one exception, legal regulations do not address armed groups in general. It is therefore welcomed if armed groups incorporate international obligations in their own manuals, codes of conduct or declarations and show in doing so explicitly that they are willing to respect certain obligations. However, this should not give the false impression that armed groups are only bound by the obligations they mention in their internal rules; in other words, just because they do not contain a specific obligation does not mean that armed groups are not nevertheless bound by it under international law. The existing uncertainty regarding the adherence of armed groups to international law is unsatisfying: on the one hand for the concerned armed groups, since they cannot anticipate possible consequences of their behaviour; on the other hand also for the international community, in order to determine whether armed groups are bound by a certain rule or not, and consequently when they breach that obligation.

It is encouraging to note, that in the last decades there were discussions in the doctrine about the obligations of armed groups under IHL and IHRL. However, not mentioned within these discussions were possible rights for armed groups in return to the duties imposed on them. Even though the hesitation and restraint of the international community on this issue is comprehensible, since these groups are also not legally accepted entities, it is however not practicable to expect armed groups to respect obligations without granting them any rights in return. For regulations in the context of armed conflicts to be effective and respected by armed groups, they must be realistic and should not undermine the capability of the armed groups to keep their military position. It is therefore indispensable that armed groups also enjoy certain rights in return for the obligations they have to respect. It has been shown before what rights armed groups may have with regard to their obligations in the context of humanitarian relief. Thus, in order to enable a better respect of the law, it is necessary that this understanding is also acknowledged under international law. Further, with regard to their binding by international law and their existence as an independent entity that has reached to a certain degree of organisational and functional capacity, it is also not legally consistent that they are not acknowledged as subjects of international law.

2.2 *Exclusion from the Law-Making Process*

It is undisputed that for a better implementation and respect of the law by armed groups, their awareness and ownership of legal obligations must be strengthened. This inevitably requires that non-State armed groups are also involved in the interpretation and implementation of existing rules, as well as in the creation of new legal regulations. Armed groups,however, are excluded from the law-making process. They can neither become parties to international treaties, nor are their practices considered as "State practice" for the establishment of customary law. They are also not invited to drafting processes or international conferences where implementation of the law is discussed.[9] Consequently, they will not feel committed to international norms in the same way as States.[10]

The exclusion of armed groups from international treaties is comprehensible, since armed groups do not enjoy the same legal personality as States or international organisations in order to become a party of an international treaty. Further, in view of the existing number of armed groups, it would also be difficult to include all armed groups or to make a choice which group should be included in the treaty process. The more actors are involved in treaties, the more difficult it is also to find a consensus. An exclusion of armed groups can therefore also be justified on the basis of the effectiveness of a treaty process.

However, the exclusion of armed groups from the development process of customary law, treaty drafting or international conferences is not justifiable with the missing legal equality to States or the number of armed groups. By contrast, because of their number, they should be heard. Customary law and international conferences enable to take note of the existing opinion and how law is perceived by them. These are important aspects for the evolvement of international law, particularly in view of the increasing number of armed groups, their opinion, particularly on IHL and, in this context, also with regard to the regulations within IHL on humanitarian assistance, is important for their application. It is here important to note that involving armed groups in such processes does not presume any legality of their status. What has been said by HOFMANN/SCHNECKENE on the necessity for engaging with armed groups in state- and peacebuilding can also be applied for the involvement of armed groups in the law-making process:

9 SAUL, p. 41.
10 SAUL, p. 41.

> Non-state armed actors are part of the problem in today's conflicts as much as they must sometimes be part of the solution.[11]

Involving the perception of non-State armed groups is necessary for improving the existing legal regime on humanitarian access. Ways and means have to be found that their involvement is accepted by States and not feared as a possible legalisation of the armed group.

2.3 *Absence of Direct Responsibility of Non-state Armed Groups*

While non-State armed groups must respect provisions of IHL and IHRL, the mechanisms for holding them accountable for violations of these provisions are less developed than those for States. There are particularly no regulations on the responsibility of armed groups similar to those in the ILC Draft Articles on State Responsibility. After the drafting of the ILC Articles, this was also criticised in the doctrine, which stated that in view of the contemporary problems "where all sorts of different non-State actors evolve at domestic and international levels a system of responsibility based entirely on State-centric paradigm" may fall short of dealing with violations of such actors.[12] That armed groups are independent entities with the capacity to be considered as subjects of international law has been shown in the discussion on binding them to customary IHL and IHRL. It is therefore legally only consistent to hold a subject with rights and duties also responsible under international law.

It can be argued that at least members of the armed groups can be held accountable for international crimes. But breaches of IHL or IHRL which do not constitute a crime according to the Rome Statute remain unpunished in the existing legal system. It is also important that non-State armed groups as an entity can be held internationally responsible. BELLAL, for example, argues in this regard that calling on armed groups collectively to change their behaviour, instead of punishing their respective members, could enable a better implementation of international law, as this would motivate them more to develop trainings and structures in order to prevent further similar breaches.[13] She further underlines that without a collective responsibility of armed groups, members of an armed group may be held judicially responsible, while the group

11 HOFFMANN/SCHNECKENE, p. 3.

12 DUDAI, p. 785; on the overall topic, see BELLAL, Direct Responsibility, p. 304 f. with further references.

13 BELLAL, Direct Responsibility, p. 305; for similar argumentation see also ZEGVELD, Accountability, p. 133; HEFFES/FRENKEL, p. 55, with further references; SASSÒLI, 'Taking Armed Groups Seriously', p. 10.

which may have incited the individual to commit that crime may remain unpunished.[14] This situation is unsatisfactory. As mentioned before, in order to be effective, every legal regime has to provide for consequences for all who are responsible for violations of the rules it seeks to promote.[15] This opinion is also shared by ZEGVELD, who points out that:

> [t]he acts that are labelled as international crimes find their basis in the collectivity. […] Therefore, the most challenging level of accountability is the accountability of armed opposition groups as such.[16]

Today, we have only the possibility of certain international monitoring and ad hoc fact-finding commissions and mechanisms where breaches of armed groups can be determined and, at best, sanctions can be imposed. But these are not judicial procedures; their goal is to change the behaviour of the armed groups, but not to establish their legal responsibility for the committed violations of international norms.[17] The possibility of "directly subjecting armed groups themselves to the rule of international law" is therefore referred to by MURRAY as a legal vacuum which has to be avoided.[18] Thus, in order to fill this legal gap, it is required to have regulations on the direct responsibility of non-State armed groups. Further, there are also judicial mechanisms required where the international responsibility of armed groups can be invoked. Finally, it is also worth mentioning that holding an armed group responsible as a collective enables the direct targeting of its financial and organisational structure.[19]

3 Legal Remedies

3.1 *Inadequate Remedies to Act Effectively*

There are without doubt many paths which can be taken by the different actors involved in relief actions to react to situations of arbitrary withholding of consent. The enforcement mechanisms which are existing today, however, are not

14 See BELLAL, Direct Responsibility, p. 305.

15 As MURRAY has pointed out, this "confirms the necessity of directly subjecting the armed groups themselves to the rule of international law, so that they may be held to account and a legal vacuum avoided," see MURRAY, p. 132.

16 ZEGVELD, Accountability, p. 133; on the overall topic, see HEFFES/FRENKEL, p. 55, with further references.

17 BELLAL, Direct Responsibility, p. 308.

18 MURRAY, p. 132; see also HEFFES/FRENKEL, p. 55.

19 ALVAREZ, p. 6.

sufficient to react effectively and timely in situations of humanitarian emergencies. The possibility for humanitarian actors and non-belligerent states to seek dialogue with the respective conflict parties and, where discussions are not fruitful, to act with unfriendly acts such as denunciation, retorsion or non-binding statements by UN bodies, or even with sanctions, provide surely important tools to compel and pressure the concerned conflict parties into fulfilling their obligations.[20] Since such actions can be taken without any specific procedures, they also allow a rather flexible and fast reaction. However, where such steps remain without any effect and concrete actions have to be taken to hold the responsible actors liable and to enable the provision of relief, the existing mechanisms seem to be inadequate.

For example, humanitarian actors could theoretically provide humanitarian relief without consent of the concerned conflict party in situations of arbitrary withholding of consent and where the relevant conditions are met. But in view of the security risks and the fear of possible breaches of law, this step will hardly be taken in practice without further support by the international community. In such situations, a resolution of the Security Council could provide the required support by deciding that certain cross-border relief can be provided by specific humanitarian actors, as it has been done in Resolution 2165 (2014). But since resolutions of the Security Council are dependent on the political will of the veto powers, the adoption of such a resolution will probably be prevented in politically controversial situations. Thus, in situations where a clarifying decision at international level is particularly required.

Judicial enforcement mechanisms, on the other hand, available to States as well as to civilians, entail, with all their formal requirements and procedural steps, a long-drawn process which cannot be used to bring about a rapid decision. Further, most of the judicial remedies are not applicable towards non-State armed groups, which also severely limits their utility.[21]

3.2 *Difficulties to Enforce before the ICC*

Even though within criminal proceedings before the ICC members of the State government and of armed groups can be held responsible, withholding of consent is not considered as an independent act of crime under the Rome Statute. The practice of the ICTY shows that subsumption of withholding of consent to relief under the existing crimes is difficult and requires a further effort to prove additional elements of the given offences (particularly challenging is the proof

20 On this topic, see also STOFFELS, p. 524.

21 STOFFELS, p. 524.

of specific intentions outside of the conduct of withholding of consent). Such an additional effort could (due to the limited time and resources available for dealing with cases) prevent the ICC to address situations of arbitrary withholding of consent. This is also true for the crime of starvation, even though it mentions the impediment of relief explicitly as a possible constituent element of the offence. It was indeed an important breakthrough that Switzerland's proposal for the amendment of Article 8 of the Rome Statute was adopted in December 2019, so that causing starvation by impeding relief in situations of non-international armed conflict can in future be prosecuted before the ICC. However, since the criminal offence of starvation under the Rome Statute requires that such an impediment of relief is committed with the intent to starve civilians as a method of warfare, the additional intentional element of a further objective in connection with the impediment has to be proved in order to address arbitrary withholding of consent to relief based on this crime. It is therefore to be seen whether there will be really a change with the new amendment of Article 8 and if situations of starvation through arbitrary withholding of consent during non-international armed conflicts will actually be addressed in the future by the ICC.

Regardless of the aforementioned concerns, it is also important to note that by not including arbitrary withholding of consent as an independent criminal offence in the Rome Statute, the wrongful content of this act as such will not be fully perceived. Denying relief actions without a valid reason constitutes already a unlawful act that should be penalised, irrespective of what the further objectives of such an act are.[22] This understanding will not be recognised if it is adjusted into other criminal offences which display additional elements in order to punish such a behaviour.[23]

Finally, penalising the arbitrary withholding of consent to relief under other crimes than starvation also seems problematic in light of the maxim of *nullum crime sine lege* which is explicitly enshrined in Article 22 of the Rome Statute, stating that "[a] person shall not be criminally responsible under the Statute

22 Similar opinion is also held by ZAPPLÀ: "As a matter of fact, it may be argued that deliberately depriving the civilian population of objects indispensable for its survival should be seen per se as a war crime. There is no need to require that starvation be used 'as a method of warfare'," see ZAPPLÀ, p. 905.

23 That impeding of relief may constitute an offence which should be penalised under criminal law, is not yet agreed by all. This was also apparent in the meetings of the Working Group to the amendement of Article 8 of the Rome Statute where inter alia the view was expressed by a delegation that the wording 'by impeding of relief' should be dropped from the definition of the criminal offence of starvations for situations of non-international armed conflict, see Chapter 13 4.1.3 (4.1.3.1).

unless the conduct in question constitutes (…) a crime within the jurisdiction of the Court." Further, it provides that "[t]he definition of a crime shall be strictly construed (…). In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."[24] Thus, in other words, a conduct cannot fall within the definition of a crime when it is not provided for in the Statute. By requiring that the definition of a crime under the Statute should be interpreted strictly and in favour of the person who is to be held responsible, there is not much room left for subsumption of conducts which are not explicitly mentioned by the Statute. This makes it also difficult to prove the requirement of intention and knowledge of unlawfulness for the individual responsibility. Since in case of ambiguity the maxim requires to decide in favour of the defendant, situations of arbitrary withholding of consent can easily be exempted from criminal liability.[25]

3.3 *Limited Remedies for Civilians*

Lastly, it should be noted that the legal remedies existing for civilians, which are the ones who are directly affected by the wrongful act of the conflict parties, are very limited compared to the remedies for non-belligerent States. In this regard, the possibilities to invoke breaches of IHL are particularly limited. The available remedies further only allow for individual complaints. In situations such as the withholding of consent to relief during non-international armed conflicts, where there are thousands and even millions of civilians affected, victims require remedies which enable procedures of mass complaints. The standards provided for individual complaint procedures cannot meet the required collective treatment of claims which is required to deal with such situations without overwhelming the capacity of the judicial bodies. Today, such mass claims are possible for civilians only before claims commissions. Claims commissions also allow individuals to invoke breaches of IHL. These commissions, however, are usually set up typically in the aftermath of an armed conflict. Further, their establishment is ad hoc, meaning that a commission is only created when the required political will is given by the international community. But, as ZEGVELD correctly put it, the possibility for victims to claim should not be provided "as a favour, but as a right" and that "[t]he prospects of a wholly discretionary response by the international community to the question of setting up a claims commission will not be enough to satisfy the need for remedial effectiveness."[26]

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24 Article 22(2) Rome Statute.

25 See ROTTENSTEINER, p. 565 f.

26 ZEGVELD, Remedies, p. 523.

CHAPTER 22

Developments Needed

> Every new idea and initiative meet with resistance. We have to find the courage to take risks, even to fail, if the goal is worthwhile.
>
> KOFI ANNAN

1 Enhancing Knowledge of the Applicable Law

1.1 *Dissemination*

1.1.1 Purpose of Dissemination

For obligations to be respected and implemented, it is important that they are known and understood. Dissemination of the relevant legal provisions in the context of humanitarian relief, such as the duty of the conflict parties to provide relief and the obligation not to withhold consent arbitrarily, istherefore relevant that the respective obligations are respected. The importance of dissemination is also explicitly recognised in the Geneva Conventions, which provide that "[t]he High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries."[1] This includes also the law which is applicable in situations of non-international armed conflict, since Common Article 3 is an integral part of the GCs. Furthermore, Article 19 AP II for its part provides that the Protocol "shall be disseminated as widely as possible."[2] This obligation is understood as a duty of the parties to the conflict, thus of States as well as of non-State armed groups.[3]

1 Article 47 GC I, 48 GC II, similarly, Article 127 GC III, and 145 GC IV.

2 On the overall topic, SIVAKUMARAN, Non-International Armed Conflict, p. 431 f.

3 Thus, it is not only a duty of the State, but lies also in the responsibility of the armed groups, as part of their obligation to ensure respect of IHL, to provide that all their members are familiar with the relevant rules of humanitarian law; see on this LA ROSA/WUERZNER, p. 333. This can also be seen in practice, as most of the commitments drafted by third parties and signed by non-State armed groups contain provisions on dissemination of the law of non-international armed conflict. Since the obligation to disseminate already exists in times

Dissemination is not only required towards members of armed forces or armed groups, but also towards civilians. As Gustave Moynier, one of the founders of the ICRC, noted with regard to the Geneva Convention:

> (i)f the Convention is to be implemented, its spirit must be introduced into the customs of soldiers and of the population as a whole.[4]

Dissemination of the applicable law to the population is required so that they know and understand when their rights are breached and what actions they can take. However, since dissemination to civilians may serve not only to inform them about their rights and duties as civilians, but also about their rights and obligations if they may later constitute members of an armed group, States are reluctant to educate their populations on the applicable law during armed conflicts.[5] This has the effect that non-State armed groups also lack knowledge of the rules of IHL relating to humanitarian access. This was also noted by Geneva Call during its investigations for its study: although non-State armed groups have expressed support for IHL, their understanding of the relevant rules on humanitarian access was found to be limited. A significant difference in the comprehension of IHL and rules on humanitarian relief could particularly be observed among armed groups, depending on whether humanitarian agencies have engaged with them on the question of humanitarian access or not. This underscores the importance of dialogue with civilians and non-State armed groups and dissemination of IHL, including rules on access to humanitarian relief.[6]

1.1.2 Content and Modalities

Practice shows that the content of today's provided dissemination and training on IHL include rather rules on military conducts than humanitarian relief or limitation of withholding of consent. It is therefore suggested that this aspect must be included in the future in the content of the dissemination and training, in order to inform the actors concerned about their rights and duties with regard to humanitarian relief. It is further important to disclose in this scope

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of peace and not only after the beginning of an armed conflict, it is the primary obligation of the State. However, after the start of an armed conflict it's also an obligation of the armed group; on the overall topic, see Sivakumaran, Non-International Armed Conflict, p. 432.; see also ICRC Study on Customary IHL, Rules 505–508.

4 Quoated in Sivakumaran, Non-International Armed Conflict, p. 431.

5 Sivakumaran, Non-International Armed Conflict, p. 431 ff.

6 Jackson, Geneva Call Study, p. 6.

also the consequences of arbitrary withholding for the members of armed forces and armed groups.[7]

There is no rule on how dissemination should be provided. Dissemination can take place trough orders, courses, commentaries, or manuals. Irrespective of the chosen modality, it is important that the content is made accessible.[8] Dissemination should therefore not be limited to handing out copies of legal texts, since ordinary combatants and civilians won't read or understand complicated legal provisions. The understanding of principles and rules must be supported, for example by summarising the content of legal regulations in simple rules or by further communication.[9] In respect of members of armed forces and armed groups, the Security Council had called on "all parties concerned (…) to provide training for members of armed forces and armed groups", which is considered as an obligation under customary international law.[10]

Where the conflict parties do not have the necessary resources, the duty to disseminate and provide training can be supported by other actors. This is for example the case of the ICRC's Advisory Service on international humanitarian law, which provides legal advice to States.[11] The ICRC has further introduced courses on IHL for members of armed forces. These services are partially also extended to non-State armed groups.[12] And also Geneva Call provides active support to armed groups in the fulfilment of their duty of dissemination, in particular for armed groups that are signatories of one of the Geneva Call's Deeds of Commitment.[13] Dissemination with regard to rights and duties in the

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7 This is formulated generally for IHL dissemination as: "They must be made aware that everyone who takes part in a conflict, irrespective of allegiance, will be held to account for any criminal acts they have committed", see La Rosa/Wuerzner, p. 333.

8 La Rosa/Wuerzner, p. 333.

9 Means of communication can be various, but predominantly in parcice are radio broadcast or messages on phones. The ways of communication must, however, be adapted to the group of persons which has to be reached. With regard to child soldiers, for example, the ICRC distributed comic books with humanitarian rules to children, on the different means see Sivakumaran, Non-International Armed Conflict, p. 434.

10 Customary International Humantarian Law, Rule 142, Heckarts/ ICRC Study, on the whole see Sivakumaran, Non-International Armed Conflict, p. 434 f.

11 Sivakumaran, Non-International Armed Conflict, p. 433.

12 The ICRC has, for example, conducted training sessions on IHL, among others, to the MILF and its armed wing or the BIAF; see on the whole Sivakumaran, Non-International Armed Conflict, p. 435 with further references.

13 Geneva Call has, for example, provided training on the ban on anti-personnel mindes and mine actions at the request of the MILF and BIAF and with the full support of the Government of the Philippines. As external training has proven in practice to be less efficient than when IHL is enforced by those who apply it, Geneva Call has engaged in „training of trainers Workshops" and train smilitary and political officiers of the relevant armed

context of relief can theoretically be provided by any other humanitarian actor if there is a request from the respective conflict party. However, in situations where consent to relief may be withheld, it is doubtful that support for the dissemination will be requested from humanitarian actors, particularly on the aspect of relief provision.

1.2 *Regular Meetings of States*

1.2.1 The Swiss/ICRC Initiative

In 2011, the 31st International Conference of the Red Cross and Red Crescent[14] (hereafter referred as International Conference) adopted the Resolution 1 on "Strengthening Legal Protection for Victims of Armed Conflicts" and invited the ICRC to pursue research, discussion and consultation with States to find ways and means to "enhance and ensure the effectiveness of mechanisms of compliance with IHL."[15] The government of Switzerland declared at the conference its availability to facilitate a process of such examination and to reinforce dialogues among States in cooperation with the ICRC. In accordance with the Resolution 1, the ICRC and the government of Switzerland launched in 2012 a joint Swiss/ICRC Initiative and conducted between 2012 and 2015 a series of consultations with States on improving the effectiveness of compliance with IHL.[16] Over 140 States participated in a total of nine consultation meetings which took place in Geneva. In addition, bilateral and regional meetings were also held with States on the initiative in order to inform and consult on the process.[17] In December 2015, a concluding report on the consultation

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group, who then train other members of the armed group, see GENEVA CALL, Training of Trainers Workshop, p. 538 ff.; on the overall topic, see SIVAKUMARAN, Non-International Armed Conflict, p. 435–36 with other examples.

14 The International Conference of the Red Cross and Red Crescent is the supreme body of the International Red Cross and Red Crescent Movement, which takes place every four years. Here, the Member States to the Geneva Conventions come together with the components of the Movement and discuss key matters of humanitarian concern and make joint commitments. Decisions are taken in the form of resolutions by consensus. It is a unique non-political forum in which the Movement's components have the same voice as States. For more information, see their website, https://rcrcconference.org/about/ (last visited 31 August 2023).

15 31st International Conference of the Red Cross and Red Crescent, 1 December 2011, 1 December 2011, Resolution 1, "Strengthening Legal Protection for Victims of Armed Conflicts," para. 6, available at: www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm (last visited 31 August 2023); on the overall topic, see PEJIC, p. 317.

16 PEJIC, p. 315.

17 PEJIC, p. 318.

progress was presented to the 32nd International Conference of the Red Cross and Red Crescent.[18]

Even though the Swiss/ICRC process began with an examination of the already existing IHL compliance mechanisms, such as the Protecting Powers, the Enquiry Procedure and the International Humanitarian Fact-Finding Commission, the consulted States did not raise any initiative to reconfigure these mechanisms. Instead, the consultation process rather affirmed that there was general support by States for the possibility to create a new mechanism for IHL compliance: the establishment of a regular but voluntary and non-politicised 'Meeting of States on IHL' as a forum for regular and systematic dialogues and cooperation among States, which could also serve as an institutional structure for other systems of compliance, like for example periodic reporting. The need for such dialogues was explained by the current situation, as explained before, that the Geneva Conventions and the APs thereto do not provide, in contrast to other international law treaties, the possibility that State Parties will meet on a regular basis in order to discuss the application of these treaties. Questions on IHL are often taken up when there is a situation of emergency. The actors involved in such discussions often don't have the required IHL expertise to engage in qualified examination.[19] It was therefore recognised that this gap should be filled by a venue in which States could examine common concerns on the implementation of IHL and exchange experiences and best practices.[20]

However, discussions within the Drafting Committee of the International Conference proved difficult and States failed to find consensus at the 32nd International Conference. The reasons for this were particularly different opinions on whether the mechanism of Meeting of States should be established or whether there were alternative paths and, if there was a new mechanism, what the relevant modalities should be. States were anxious to ensure the adoption by consensus of a respective resolution. The limited time which was available for the negotiations was also seen as considerable factor, which made it difficult to narrow down the positions of the States.[21] Resolution 2 of the Conference therefore recommended the continuation of the intergovernmental process in

18 ICRC SFDFA, Concluding Report prepared for the 32nd International Conference of the Red Cross and Red Crescent, 32IC/ 15/19.2, Geneva 2015, available at: rcrcconference.org/wp-content/uploads/sites/3/2015/04/ 32IC-Concluding-report-on-Strengthening-Compliance-with-IHL_EN.pdf (last visited 31 August 2023).

19 PEJIC, p. 318.

20 PEJIC, p. 323.

21 On the overall topic, see PEJIC, p. 328.

order "to find agreement on the features and functions of a potential forum of States."[22]

The last meeting of States on this topic took place in March 2019, where the ICRC and the Swiss Government presented a Factual Report on the meetings and consultations which took place after the 32nd International Conference. With this, the consultation process was concluded and States have ultimately failed to find a consensus on the establishment of a new IHL compliance mechanism. The Factual Report finish with the final remark: "Despite efforts undertaken by delegations, it became clear that, in the current international environment, the time was not ripe for reaching a consensual agreement among States on ways to strengthen respect for IHL within the intergovernmental process. Further efforts will be necessary to find solutions to bring about increased respect for IHL."[23]

1.2.2 Readopting the Initiative

Even though the consultation process of the Swiss/ICRC is officially closed since March 2019, the idea of an international body where States could gather on a frequent and systematic basis should be readopted. The need for a regular discussion and exchange forum was acknowledged by the States during the consultation process. The Factual Report reaffirmed that at no point during the consultations States have expressed that the discussion on better application of IHL was irrelevant or not important. On the contrary, they acknowledged the process was absolutely required to better protect persons in armed conflicts and to reduce suffering. The consultations showed that States have a strong interest in finding ways and means to strengthen compliance with IHL.[24] Without such a forum, important questions of IHL will be left unaddressed by the law-making actors. The problem of arbitrary withholding of consent as such, for example, has until today not been discussed at global level by States. In order to identify the required legal and practical developments, States need a forum where such questions can be discussed.

Given the time invested in the initiative process, the number of consultations and, in particular, the knowledge gained on how to improve compliance with IHL and how to build a platform for exchange between States, it would

22 32nd International Conference of the Red Cross and Red Crescent, 8–10 December 2015 in Geneva, Resolution 2. 'Strengthening compliance with international humanitarian law', 32IC/15/R2, available at http://rcrcconference.org/app//uploads/2015/04/32IC-AR-Compliance_EN.pdf (last visited 31 August 2023).

23 ICRC/FDFA, Factual Report, p. 9.

24 ICRC/FDFA, Factual Report, p. 9.

be a loss if all this knowledge were not used for future discussions. The factors for the existing hesitation of States for agreeing to a new mechanism have to be analysed and proper solutions to be found so that the initiative can be readopted. The decision that the mechanism should be voluntary and non-politicised was definitely a proposal in the right direction to convince most of the States. As mentioned before, the limited time for negotiations and discussions on the modalities has already been identified as a difficulty which made a consensus between States challenging. This aspect has therefore to be reconsidered in further discussions.

2 Further Legal Regulations

2.1 *Clarification of the Existing Rules in AP IV or MoU*

In order that the existing rules governing access to humanitarian relief operations during non-international armed conflicts are applied correctly, it is necessary to clarify their content.[25] Clarification is particularly required with regard to the following provisions:

– *that the requirement of consent for provision of relief include consent from all relevant conflict parties*. In this respect, it has to be explained who the relevant conflict parties in non-international armed conflicts are, and that in certain situations this includes (what's already the case in practice) the consent ofnon-State armed groups. It must be clarified that this is not only required for security reasons, but also based on legal arguments. Such an understanding is also consistent with the commonly existing opinion that non-State armed groups also have the obligation not to withhold consent to relief arbitrarily. In order to call upon non-State armed groups to fulfil this obligation, it has to be agreed beforehand that there is a need to obtain consent from such groups.

  The requirement of consent of non-State armed groups will be surely a subject on which states may not easily agree in fear of that this could be understood as a recognition of their legality. To address such concerns, it is advisable that the relevant provision explicitly includes the phrase mentioned in Common Article 3 to GCs, namely that the application of the provision "shall not affect the legal status of the Parties to the Conflict."[26]

25 Van den Herik/Jägers/Werner, CAVV Advisory Report, p. 25.

26 Common Article 3(2) to the GCs.

– *that conflict parties are not allowed to withhold consent to humanitarian relief operations arbitrarily*. This requires clarification on what are reasonable grounds and what amounts to arbitrariness.
– *what the consequences are when consent is withheld arbitrarily*. This requires explanation on how the conflict parties can be held liable and who is entitled to invoke their responsibility and to claim eventually reparations.

Those clarifications can be provided through different means. The Advisory Committee on Issues of Public International Law of Netherlands (CAVV) suggested in its Report on humanitarian assistance during armed conflicts, that the issue of relief operations in situations of non-international armed conflict could be addressed explicitly in a new treaty like for example a new Additional Protocol IV to the Geneva Conventions.[27] In view of the latest discussion on the Swiss/ICRC Initiative, the author of this book doubt the interest of the international community to deal with questions of humanitarian relief in a new binding instrument. The probability that an Additional Protocol or any other treaty on relief operations (including regulations on arbitrary withholding of consent) would overcome the necessary formal hurdles and be accepted by a considerable number of States must be assessed as rather low.

As an alternative to a treaty regulation, the CAVV suggested that States could make an interpretative declaration regarding the relevant norms to relief in non-international armed conflicts in the GCs and APs (particularly regarding Article 18 AP II).[28] Such a declaration, also referred to as a Memorandum of Understanding (MoU) in international law, can determine the requirement of consent and provide the before-mentioned clarification. The advantage of a MoU over contractual arrangements is that it is not legally binding and therefore, more likely to be accepted bymany States. Moreover, it has fewer formal requirements and can be negotiated more quickly. Nevertheless, it could serve as a tool to manifest the existing understanding and consensus within the international community[29] and would, at the same time, constitute a single written document where all relevant provisions are easily accessible for all relevant actors, including civilians.

27 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 25.
28 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 25 f.
29 On the characteristics of MoU, see KÄLIN/EPINEY/CARONI/KÜNZLI, pp. 16 and 81; SWISS FEDERAL OFFICE OF JUSTICE, p. 1 f.

2.2 *Arbitrary Withholding of Consent as an Independent Crime*

In light of the aforementioned concerns, the adoption of withholding of consent to relief in situations of non-international armed conflict as a separate criminal offence under the Rome Statute could bring greater clarity and practicability for prosecutions before the ICC. Also, the frequency of occurrence of such situations during contemporary armed conflicts and the gravity of such acts justify the amendment of the Rome Statute. As ROTTENSTEINER argues:

> the impact of the denial of humanitarian assistance can be just as strong as massacres committed with knives.[30]

An amendment of the Rome Statute and including a crime which is already considered as a breach under IHL and IHRL would, as Switzerland noted in its proposal for amending the Rome Statute with regard to the crime of starvation, "strengthen the international legal framework" and "send a strong signal to the victims."[31]

Since the arbitrary withholding of consent to relief concerns situations of non-international armed conflict, it has to be included as a war crime in the catalogue of Article 8 of the Rome Statute. It therefore requires a proposal for amendment of Article 8 of the Rome Statute. Based on Article 121(1) of the Rome Statute of the ICC, any State Party can propose amendments thereto. The text of the proposed amendment must "be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties." The proposal can then be dealt with by the ASP with support of the Working Group on Amendments to the Rome Statute. The amendment finally needs to be adopted by consensus or by a two-thirds majority.[32]

However, the discussions on including starvation as a crime for situations of non-international armed conflict in Article 8 of the Rome Statute have shown how difficult the process of amending the Rome Statute can be in practice. There, it was even a crime which has already existed under the Rome Statute for international armed conflicts. Thus, the threshold for including a new offence will be accordingly higher. But even if this concern is left aside, it is to be noted (as was also mentioned for the adopted amendment of the crime of starvation[33]) that an amendment to Article 8 of the Statute only enters into force for States that have ratified the amendment and not for those that have

30 ROTTENSTEINER, p. 566.
31 See Chapter 13 4.1.3 (4.1.3.3).
32 See on the process of amendment of the Rome Statute, Article 121 ff. of the Rome Statute.
33 See Chapter 13 4.1.3 (4.1.3.1).

not. Thus, without a Security Council referral, the ICC cannot exercise its jurisdiction regarding withholding of consent to relief during non-international armed conflicts when it is committed by nationals or on the territory of State parties that have not ratified the amendment. The same also applies to nationals of States that are not (yet) parties to the Statute, such as Syria or Yemen. And even if they should subsequently become party to the Statute, they can decide at the time of the ratification, acceptance, approval of, or accession to the Statute if it they wish to accept the amendment.[34]

Adopting an amendment would therefore only be half the battle. It is also necessary for the amendment to be ratified by as many States as possible in order to create a comprehensive penalisation of the crime of arbitrary withholding of consent to relief operations.[35]

3 Independent International Body for Assessing Arbitrariness

3.1 *General Requirement*

In order to monitor if there is indeed a justification for a withholding of consent to relief operations, it is suggested in the doctrine to set up an independent international body with a respective mandate. Such a body could act whenever it is needed and not only on an ad hoc basis, as is the case with Special Representatives. It should be proposed to establish a permanent body that can be deployed without much delay in urgent and critical situations where civilians are suffering undue hardship.

In this regard, it is suggested that the most suitable organisation to perform this task would be the International Humanitarian Fact Finding Commission, which could determine, according to given facts, whether or not consent has been withheld arbitrarily.[36] At present, the IHFFC is constrained in its operations by the fact that it can only act if a State has accepted its competence.[37] A review of the role and function of the IHFFC is therefore discussed in the following.

The International Humanitarian Fact-Finding Commission, as outlined before, has only been mandated once since its establishment in 1991.

34 For more information, see ASP, Resolution 'on amendments to article 8 of the Rome Statute of the International Criminal Cour', ICC-ASP/18/Res.5, rectical para. 2 based on Article 121(5) Rome Statute and Article 40(5) VCLT.

35 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 27.

36 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 26.

37 VAN DEN HERIK/JÄGERS/WERNER, CAVV Advisory Report, p. 26.

Even though there have been ample opportunities before to mandate the Commission, none of the initiatives have been successful. And even after its first mandate with the OSCE in 2017, the Commission has remained inactive to date.[38] In order to achieve in the future a more relevant role as an enforcement mechanism of IHL, including for situations of arbitrary withholding of consent during non-international armed conflicts, it is required that the competence and the procedure for the setting up of the enquiry of the Commission are reconsidered. There are a number of possible reasons identified in the doctrine as to why the Commission could not yet exploit its full potential. In the following, the most prevalent explanations in the doctrine for the inactivity of the Commission will be outlined and possible modifications to the mandate and enquiry process suggested, which could lead to a more frequent and effective use of the Commission.

3.2 *Possible Role for the International Humanitarian Fact-Finding Commission*

3.2.1 Required Modifications

3.2.1.1 *Modification of the Requirement of Consent from All Conflict Parties*

There is a lack of political will by States to use the Commission for specific cases. Even in the OSCE case, the investigation was not initiated by a State but by an international organisation.[39] The main obstacle for the success of the Commission is therefore seen in the fact that States are not willing to give either an advance or an ad hoc consent to the enquiry by the Commission, as it is provided for in Article 90 AP I. In contrast to that, other fact-finding and inquiry missions which have been set up for example by the UN in the last couple of years, were created independent of (and sometimes even against) the will of the concerned sovereign States.[40] And also compared with criminal tribunals dealing with violations of IHL, it shows that the two most successful approaches for setting up were either by an ad hoc measure of the UN Security Council, which was the case for example for ICTY and ICTR, or by establishing a permanent ICC with a pre-established agreement on its jurisdiction, which does not have to be reconfirmed by States once the respective conflict will be investigated.[41] In contrast to the ICC, the Commission requires even with regard to States which have submitted a declaration in advance, a

38 HEINSCH, p. 89 f.; on the first mandate of the Commission, see Chapter 18 2.3.2.
39 AZZARELLO/NIEDERHAUSER, Humanitarian Law & Policy Blog.
40 HEINSCH, p. 95.
41 HEINSCH, p. 96.

reaffirmation so that the Commission can carry out the enquiry in a particular situation.[42]

It can be assumed that the strict requirement of the consent of all parties to the conflict prior to an investigation of the Commission could prevent its use also in the future.[43] As a solution to this, it can be suggested to modify the requirement of consent in Article 90 AP I so that, at least where there is already a prior consent, there is not a consent of the concerned parties required as a re-confirmation of the prior acceptance. Furthermore, this possibility should also be extended to non-State armed groups, so that not only States can be bound by a pre-agreed competence of the Commission, while non-State actors have the possibility to make their decision depending on whether an investigation in relation to a particular incident is in their favour or not.

The doctrine further suggests that the requirement of consent can even be avoided when the Commission is used by UN institutions, such as the UN Security Council under Chapter VII of the UN Charter. This understanding is in reference to Article 103 of the UN Charter, which states that the obligations under the Charter shall prevail with regard to other obligations of the Member States. It is therefore concluded that "[i]f the Commission initiates an enquiry upon request of the United Nations in such a case, the parties concerned could not object to the initiative on the basis of Article 90."[44] The use of the Commission by the institutions of the UN would also have the advantage for the UN of not creating new and costly ad hoc fact-finding missions, while there exists already the Commission as a permanent body for the same purpose.[45]

3.2.1.2 *Extended Application of Article 90 AP I*

In contrast to international armed conflicts, non-international armed conflicts are not explicitly mentioned in Article 90 AP I, where the mandate of the Commission is outlined, wherefore it is still controversial in doctrine if the Commission can act in such situations. The classification of a conflict as a non-international armed conflict is therefore seen as a strong obstacle for an effective use of the Commission in situations of non-international armed conflict, which are the majority of the conflicts nowadays.[46] An explicit mention in a legally binding clause that the mandate of the Commission according to Article 90 AP I also includes situations of non-international armed conflict

42 See Chapter 18 2.3.2; HEINSCH, p. 96.
43 HEINSCH, p. 91.
44 KUSSBACH, p. 185.
45 KUSSBACH, p. 185; HEINSCH, p. 94 f.
46 HEINSCH, p. 90.

could therefore bring more clarification in this respect. In order to be an extension of the scope of application of Article 90, this clause also has to be adopted by all members of AP I. With regard to non-international armed conflicts, such a clause must further also mention that involved parties to the conflict in the sense of Article 90 AP I may be, besides the affected-State, also non-State armed groups. An extension of the scope of Article 90 AP II also has to reaffirm the latest understanding of the Commission, that international organisations can also be considered as parties involved in a conflict. In this context, it is required that the conditions are specified when an international organisation will fulfil the requirements of a party involved in a conflict. As a consequence of this understanding, the Commission should continue to offer its services to international organisations involved in conflicts.[47] In situations of arbitrary withholding of consent to relief operations, this includes also international humanitarian organisations which face breaches of IHL.

3.2.1.3 *Modification of the Confidential Approach*

The confidential approach of the Commission and the fact that the report of the commission can only be published when both parties consent, as provided in Article 90(5)(c) AP I, may be an advantage to motivate States to agree on the competence of the Commission.[48] But in order to enhance the effect of the report, it is suggested in the doctrine to provide the outcome of such an investigation for diplomatic or judicial decisions concerning the accountability of a conflict party for breaches of IHL.[49] For situations of arbitrary withholding of consent to relief operations, these findings could be particularly useful for the institution which has to determine whether consent is withheld arbitrarily or not. But in order not to confuse the role of the Commission, which as a fact-finding mission does not generally take on a function with regard to judicial determination, the present book rather recommends a gradual approach and suggests that the Commission should – similar to the ICRC – may preserve the right to communicate its findings as a last resort, where the findings lead to the assumption that there have been grave violations of IHL and the concerned conflict parties are unwilling to cooperate and change their behaviour. In this way, the impact of the report can be preserved without endangering the advantage of the acceptance of the Commission in the first place.

47 HEINSCH, p. 96.
48 HEINSCH, p. 93.
49 HEINSCH, p. 91.

3.2.2 Raising Awareness of the Existence and Competence

To date, only 76 States have made a declaration according to Article 90 AP I on the competence of the Commission; the other States can only agree to the use of the Commission on an ad hoc basis.[50] The lack of awareness about the existence and the competence of the Commission is considered as a reason for the limitation of the work of the Commission. It is therefore suggested in the doctrine that the Commission should raise its visibility and bring its existence to attention and clarify its competence and the benefits of its acceptance. This should include the fact that a separate declaration on Article 90 AP I is required from States for the competence of the Commission and that ratifying AP I is not enough. This awareness could be raised through diverse international fora such as conferences or public events.[51] In this respect, the Commission could also further outreach to national IHL Commissions and other international institutions. In the past, for example, the European Council has raised awareness by making a reference to the Commission in its 2005 updated European Union Guidelines on Promoting Compliance with International Humanitarian Law. The Council Presidency has urged all Member States that have not yet ratified AP I to do so and to agree to the competence of the Commission.[52]

4 Integration of Non-state Armed Groups

> "A legal system which treats actors as second-rank citizens should not be surprised that those second-class citizens aim to upgrade their status, and the shortest route to being heard and being taken seriously is through violence."[53]

4.1 *Acknowledging as Subjects of International Law*

In order to provide clarity as to when and how armed groups can be bound by international law, they should be acknowledged as subjects of international law

50 HEINSCH, p. 91.

51 GARRAWAY, p. 815; HEINSCH, p. 94, 96 f.

52 European Council, Updated Europena Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL), OJ C303/12, 15 December 2009, Aricle 15 (a), p. 259; on the overall topic, see HEINSCH, p. 94.

53 JAN KLABBERS, '(I Can't Get No), Recognition: Subjects Doctrine and the Emergence of Non-State Actors', in Jarna Petman and Jan. Klabbers, (eds), Nordic Cosmopolitanism. Essays in International law for Martti Koskenniemi, (Leiden, 2003), pp. 351–69 (reproduced

who have the capacity to have international rights and duties. This acknowledgement can be provided, for example, through explicit reference to them in regulations concerning non-international armed conflicts, with a clear expression of their obligations and rights. This should also include IHL provisions that are not directly related to warfare, as well as relevant IHRL regulations.[54] SIVAKUMARAN explains in this respect:

> improving the clarity of the rules on a subject may entail higher levels of respect, since every involved party would be able to recognize its own obligations and act accordingly.[55]

States' main fear that considering armed groups as subjects of international law could legitimise their existence and objectives[56] can be excluded, for example, through an additional reference in these treaties to a provision similar to the one in Common Article 3 of the GCs, which provides, inter alia, that the "(t)he application of the (…) provisions shall not affect the legal status of the Parties to the conflict. "[57] Further, it is important to clarify the 'real' meaning behind the concept of subjectivity. As mentioned before, the fear of States to acknowledge that armed groups are subjects of international law is often based on the confusion between legal personality and legitimacy. It is important to note that recognition of armed groups as subjects of international law with international duties and rights does not confer any legal status on the existence of the armed groups, nor on their aim or goals. That there is not necessarily clarity in this regard, even among authors who would welcome a recognition of the legal personality of armed groups, is shown by the following statement by CISMAS who suggests in this regard that:

> legitimation may indeed take place; however, one needs to understand and emphasize that the resulting legitimation is that of the actor as rights-holder and duty bearer, not of its goals and conduct.[58]

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in A. Bianchi, (ed), Non-State Actors and International Law, (Ashgate, 2009) pp. 37–55, at pp. 54–5).

54 CLAMPHAM explicitly proposes, that "human rights treaties need to address armed non-State actors directly with clear expression of their obligations," see CLAMPHAM, p. 42 f.

55 SIVAKUMARAN, Implementing Humanitarian Norms, p. 125.

56 HEFFES/FRENKEL, p. 42.

57 Common Article 3(4) of the GCs.

58 CISMAS, p. 75; HEFFES/FRENKEL, p. 42.

Even if the essence of Cismas' statement can be agreed with, the term legitimacy in the context of the recognition of armed groups "as right-holder and duty bearer" is misplaced. Acknowledging that an armed group is a holder of international rights and duties is a recognition of its international legal subjectivity, not of its legitimacy. It is important that these two legal concepts are clearly distinguished from each other. Legitimacy characterises an entity that is lawful in its existence. The question of whether an armed group has legitimacy or not is a completely different question from the one of whether it has international subjectivity. International subjectivity, as mentioned before, is established objectively for an entity that exists independently by virtue of its organisational structure and functionality and its possession of international rights and obligations. Having international subjectivity does not grant at any point legitimacy. An armed group that is perceived as a party to a conflict in a non-international armed conflict not only has rights and obligations under international law, but also has the necessary organisational and functional prerequisites to be considered an international subject. The recognition of armed groups as subjects of international law would thus only be a legal recognition of what is a reality.

4.2 *Involving in the Law-Making Process*

4.2.1 Representation of Armed Groups at the Drafting of Legal Regulations

Including non-State actors in the process of drafting the rules that will govern their actions can create a sense of ownership of the norms and increase the likelihood that these norms will subsequently be respected.[59] Armed groups should therefore be represented in some form in the drafting of new or revising regulations. According to Bangerter, compliance with IHL will only be enhanced only "if the reasons used by armed groups to justify respect or lack of it are understood and if the arguments in favour of respect are taken into account."[60] Acknowledging that armed groups have a role to play in the

59 There is evidence indicating that when non-State armed groups have had a role in the drafting of rules, greater levels of compliance have been achieved, see Geneva Call, DR Congo: Child Soldiers Leave Armed Groups Following Geneva Call's Awareness-Raising Efforts, available at https://www.genevacall.org/news/dr-congo-child-soldiers-leave-armed-actors-following-geneva-calls-awareness-raising-efforts/ (last vis-ited 21 December 2017); Sivakumaran, Implementing Humanitarian Norms, p. 125; Heffes/Frenkel pp. 72 and 51.

60 Bangerter, p. 353 and 383.

formation of the law would therefore also be an important step to understand the perception of the rules by armed groups.[61]

Possible objections by governments against such participation, and arguments like that this could lend legitimacy to such groups and would "elevate criminals to the status of to law-makers in their own interest"[62], are understandable fears, but from the point of view of establishing effective legal regulations in the context of armed conflicts, such involvement is inevitable.[63] Furthermore, as explained before, such participation would not confer any legal status upon the armed group. As SASSÒLI stated, it is important that "armed non-State actors are not be seen in situations of an ongoing armed conflict as a collection of criminals, but rather as party to the conflict."[64] However, if the current political climate should be highly resistant to a full participation and an active role of armed groups in the drafting of laws, it is suggested in the doctrine that at least the "armed groups' point of view" should be considered in the law-making process.[65] This could be achieved, for example, by collecting the views of such groups through bilateral consultations or in multilateral meetings, a service that could be provided by an organisation such as Geneva Call.

4.2.2 Contribution of Non-state Actors to Customary Law

The perception and understanding of armed groups of the rules applicable to armed conflicts can also be taken into consideration by accepting their contribution to the formation of customary international law. The ICTY, for example, has supported such a view by taking the practice of non-State actors into account when assessing customary international law (although in a limited way).[66] However, most authorities today, maintain the view that only States can contribute to the formation of customary law.[67] Such an understanding

61 On the overall topic, see HEFFES/FRENKEL, pp. 32, 54 and 59; BELLAL/HEFFES, p. 128; see also JACKSON, Geneva Call Study, p. 5: "the importance of negotiating with ANSAs to ensure access has come to the forefront. It is therefore important to understand ANSAs' perspectives and moves and it is therefore necessary to engage with them." Also SIVAKUMARAN argues: "[the] key point is that armed groups should have some sort of role in the creation, translation and enforcement of humanitarian norms in order to foster a sense of ownership and therefore improve levels of compliance," see SIVAKUMARAN, Implementing Humanitarian Norms, p. 145 f.

62 CLAPHAM, Rights and Responsibilities, p. 42.

63 CLAPHAM, Rights and Responsibilities, p. 42.

64 SASSÒLI, Taking Armed Groups Seriously, p. 64.

65 CLAPHAM, Rights and Responsibilities, p. 42.

66 ICTY, in the Case *Prosecutor v. Tadíc;* see WORSTER, p. 236.

67 On the overall topic, see WORSTER, p. 236 ff.

is not comprehensible with regard to the regulations applicable to situations of non-international armed conflict. In order to ensure that international customary law remains realistic and effective, the involvement of armed groups is inevitable.[68] As Sassòli argues, customary law is a legal source which is based on the practice and opinio iuris of the subjects who apply these rules. Accordingly, the behaviour (in the form of acts or omissions) and understanding of the armed groups, as one of the main subjects of these rules, must be taken into consideration for the determination of existing international customary law in situations of non-international armed conflict. He concludes, that this will also increase their sense of ownership.[69] However, against this view, some authors have expressed their concern that an inclusion of the armed groups' practice and *opinio iuris* could be counterproductive and disrupt the formation of custom, or even lead to a regression of the customary legal framework, since these actors frequently violate the existing legal order.[70] Such a concern is based on the misconception that the contrary practice of armed groups alone could undermine the content of a norm. It is important to note that if the practice of armed groups is taken into account, it will be alongside that of the States. Thus, the understanding of States will still play an important role. Further, a violation does not necessarily constitute an *opinio iuris*. It also has to be assessed if the violation of the respective norm is generally regarded as just. Since a justification of a violation of an existing norm will be politically and legally difficult, it can be assumed that it is rather unlikely that a contrary practice by armed groups could lead to a modification of an existing norm or even to the emergence of a new contrary norm.[71]

An inclusion of armed groups' *opinio iuris* and practice in the formation of customary law will certainly have its practical difficulties and challenges, such as establishing the *opinio iuris* of armed groups in the first place. But that they are not insurmountable is shown, for example, by Bellal/Heffes in their discussion on how the *opino iuris* of non-State armed groups can be determined in practice.[72] Sivakumaran, for example, suggests that the *opino iuris* of the armed groups could be identified in accusations or statements expressed by them.[73] In any case, it should be noted that practical difficulties of implementation cannot be invoked as an excuse for what is legally necessary.

68 Sassòli, Taking Armed Groups Seriously, p. 21.

69 Sassòli, Taking Armed Groups Seriously, p. 21 f.; with similar arguments Heffes/Frenkel, p. 49.

70 For example, Ryngaert, p. 289; see Fortin, p. 326 f. with further references.

71 See on this also argumentation in Fortin, p. 327.

72 On challenges and possible solutions, Bellal/Heffes, p. 133 ff.

73 Sassòli, Taking Armed Groups Seriously, p. 21 f.

4.3 *International Responsibility for Non-state Armed Groups*

In order to hold non-State armed groups as an entity responsible, it is necessary that the wrongful acts committed by their members can be attributed to them. Since there are no general rules on attribution for non-State actors (like the ones provided by the ILC Draft Articles for State Responsibility), such rules must be established. There are different attempts in the doctrine. In this regard, it is to be noted beforehand that the existing variety of non-State armed actors in non-international armed conflicts makes it difficult to identify general rules of attribution that can be applied to all forms of armed groups. Some of the following identified elements may need to be adapted depending on the individual organisational structure of the respective group.[74]

The ILC Draft Articles on State Responsibility provide, with regard to attribution, that "the conduct of any State organ shall be considered as an act of that State under international law [...] whatever position it holds in the organisation of the State. [...]. An organ includes any person or entity which has that status in accordance with the internal law of the State."[75] In line with this definition, it is argued in the doctrine that also for the attribution of a wrongful act to a non-State armed group, there has to be an institutional link between the person committing the act and the group.[76] Thus, attributing a wrongful act to an armed group requires that the person committing the act has to be identified as an organ of that group. This includes leadership, commanders and also combatants. However, as there is no international or national legal definition of who constitutes an organ of an armed group, the internal rules of the armed group itself may serve as a reference for the identification of its organs.[77] For example, the statutes of the "Mouvement de Libération du Congo"[78] or of the "Sudan Revolutionary Front"[79] provide information on the organisation and leadership of the armed group.[80] Where non-State armed groups do not have

74 HEFFES/FRENKEL, p. 60.

75 Art. 4 ILC Darft Articles on the Responsibility of States; see HEFFES/FRENKEL, p. 61 with further references.

76 Wrongful acts committed by organs and members of an armed group shall be attributable to that group, see BÍLKOVÁ, p. 279; HEFFES/FRENKEL, p. 61 with further references.

77 HEFFES/FRENKEL, p. 61.

78 See Mouvement de Libération du Congo, 'Statuts du Mouvement de Libération du Congo'(1999), Article 11, available at http://theirwords.org/media/transfer/doc/cd_mlc_1999_09-28d0edd1d32a444ad3205b5f82476140.pdf (last visited 31 August 2023).

79 See Sudan Revolutionary Front, 'Statute of the Sudan Revolutionary Front of 2012', Article 11, available at (2012), http://theirwords.org/media/transfer/doc/ut_sd_srf_2012_27_eng-3a5dcae4a8d4ebe3cdc9fc28f5536d44.pdf (last visited 31 August 2023).

80 On the overall topic, see HEFFES/FRENKEL, p 61 ff. with further references.

such internal regulations, this method cannot be applied. It should therefore be considered to provide for such cases a general legal definition of an organ of an armed group.

Finally, it is to be mentioned that similarly to States, there should be the rule that even if the organs of an armed group act ultra vires, their behaviour must remain attributable to the entity.[81] Such an understanding has been affirmed, for example, by the Special Rapporteur on Human Rights in Sudan, who stated in his report that the non-State armed group "bears responsibility for the violations and atrocities committed in 1995 by local commanders from its own ranks, although it has not been proved that they committed these actions on order from the senior leadership, nor is it known whether they have been or will be pardoned by superiors."[82]

5 New Enforcement Mechanism

5.1 *GA Resolution for Providing Relief without Consent*

A different approach for facing situations of arbitrary withholding of consent is suggested in the doctrine by Barber. In view of the developments in Syria, where consent to relief operations has been withheld and resolutions of the Security Council to authorise provisions without consent have been blocked by the veto of a permanent member,[83] Barber proposes that resolutions of the General Assembly could serve in such situations for humanitarian actors as a basis for providing relief without consent by affirming the applicability of the principle of necessity.[84] The fact that in situations of arbitrary withholding of consent humanitarian actors can theoretically invoke the principle of necessity is in practice not sufficient to overcome the concerns of humanitarian actors about providing relief without consent, which constitutes *prima facie* an illegal act. Barber therefore suggests that the General Assembly could provide, through a resolution on a certain situation, the required legal affirmation for humanitarian actors to apply the principle of necessity, by declaring that the protection of the rights of civilians is "an essential interest of the international community which faces grave and imminent peril, and that the only way

81 Ultra vires acts of State organs are mentioned in Article 7 ILC Draft Articles on State Responsibility.

82 Report of the Special Rapporteurs and Representatives on the Situation of Human Rights in the Sudan, UN Doc. A/50/569, 16 October 1995, para. 73; see Heffes/Frenkel, p. 65.

83 See Chapter 18 II 5.2 (5.2.2).

84 Barber, EJIL Talk Blog.

of safeguarding that interest is for States and/or international organisations to provide lifesaving humanitarian assistance."[85] Even though resolutions of the General Assembly are not binding, such an affirmation would nevertheless constitute a pre-emptive legal finding and presumption that the unlawfulness of providing relief without consent is precluded by the principle of necessity.[86]

Since the General Assembly is used to make legal findings in its resolutions,[87] BARBER argues that determining the legal grounds for the application of the principle of necessity would be in line with the Assembly's practice.[88]

However, it is a realistic assumption of BARBER to conclude that it would be "a long shot to suppose" that, even if the General Assembly would provide the required legal arguments, this would result in an increased humanitarian assistance without consent. The existing legal concerns about providing relief without consent will not disappear any time soon.[89] In this regard, it is important to note that, besides legal concerns, there are also security reasons in practice which prevent humanitarian actors from providing relief without consent. Such security concerns can (at least partially) only be mitigated if there are also efficient legal mechanisms to hold the responsible parties accountable.

5.2 *Permanent Claims Commissions for Individuals*

In order to overcome political concerns about the enforcement of law, the author of this book is of the opinion that the possibility to claim breaches of IHL and IHRL during non-international armed conflicts has to be placed in the hands of individuals. They should have the possibility to invoke such breaches directly and at any time. This requires the establishment of an independent

85 BARBER, EJIL Talk Blog.

86 BARBER, EJIL Talk Blog.

87 The competence of the Assembly to provide legal determinations within its resolutions is also accepted by other legal scholars, for example NIGEL WHITE, The law of international organisations, 2nd edition, Manchester 2005; and OSCAR SCHACHTER, 'The Quasi-Judicial Role of the Security Council and the General Assembly', in: The American Journal of International Law, Vol. 58, No. 4 (1964), pp. 960–965.

88 BARBER explains: "The Assembly has, for example, determined that particular state conduct constitutes – variously – aggression, genocide, a violation of the territorial integrity of another state, a gross and systematic violation of human rights, and a violation of international humanitarian law. It has made findings regarding a state's entitlement to self-defence; has found states to be entitled to compensation; has made findings regarding the identity of parties to a conflict and the characterisation of a conflict; has expressed its view on the 'necessity' of particular courses of action such as sanctions; and it has on several occasions affirmed the need for humanitarian assistance," see BARBER, EJIL talk Blog.

89 BARBER, EJIL Talk Blog.

and impartial judicial body of a permanent nature, such as a permanent international claims commission for individuals. Such a commission should be competent to deal with complaints of IHL and IHRL breaches committed during non-international armed conflicts. In contrast to the existing regional human rights courts, which enable individual complaints, such commissions should provide for the possibility of mass claims for individuals, since such remedies are better suited to situations like the arbitrary withholding of consent to humanitarian relief, where the conducted breach of law affects numerous civilians. In one single proceeding, the commission could decide on the situation of many of the civilians concerned. Moreover, such a commission could also be authorised to deal with claims against non-State armed groups and to hold them directly responsible.

The formal requirements and application thresholds for such judicial bodies should be kept low, so that they do not constitute an undue obstacle for civilians to pursue their claims. In addition, the procedure has to be simplified and accelerated so that the wrongful conflict party can be held responsible and compelled to act in accordance with the law within a reasonable time. However, since legal proceedings are lengthy processes by their very nature, it should be considered to authorise such judicial bodies to impose binding provisional measures, like for example a provisional decision on the possibility of providing relief, without the requirement of consent. Finally, it should be noted that such an enforcement mechanism could remove the current existing imbalance between the legal remedies available to individuals and to non-belligerent States. Moreover, it would not leave the affected civilian population dependent on the political will of the international community to take effective action. And this, in turn, would send an important signal to the affected civilians, whose interests must be at the centre of any enforcement mechanism for the rules of armed conflict.

How access to such a commission can be guaranteed to civilians living in humanitarian crises where possible communication channels may be interrupted (whether, for example, national NGOs should be able to collect and submit complaints on behalf of the affected civilians) needs further analysis. This is, however, more a practical than a legal issue. These concerns should therefore not be used as an excuse for not considering such a mechanism as a possible option.

The author of this book is aware that the development proposals presented in this chapter may appear utopian or too far-reaching. But, as the quote at the beginning of this chapter says, new ideas must be risked "*if the goal is worthwhile.*"

Conclusion

1 Summary

When parties to a non-international armed conflict withhold their consent to international humanitarian relief in situations where the civilian population is suffering undue hardship because of a humanitarian crisis, this raises a number of legal questions. Although it is generally agreed that consent to relief should not be arbitrarily withheld in such situations, there is little understanding of what constitutes an arbitrary withholding and what the consequences are. The aim of this book was therefore to examine the legal rules and consequences of arbitrary withholding of consent to humanitarian relief, and to clarify the existing legal uncertainties. Since the provision of relief during non-international armed conflicts involves several actors, the examination was conducted from the perspective of the five main actors involved, namely the affected State, the non-State armed groups, the humanitarian actors, the non-belligerent States, and the civilian population within the affected State. This provided a holistic picture of the existing legal challenges. In the following, the most important findings of the book are summarised.

The presentation of the factual and normative elements in *Part 1* has shown the complexity of the task of *International Humanitarian Relief in Non-International Armed Conflicts*. It has become clear that the delivery of aid in non-international armed conflicts requires the interaction and cooperation of different actors. An important finding of Part 1 is that not only armed groups with territorial control are relevant to the provision of humanitarian relief in non-international armed conflicts, but also those who otherwise have influence over access to affected areas. This approach differs from the prevailing doctrinal view, which considers only armed groups with territorial control as non-State actors whose consent may be relevant to the provision of assistance. In practice, however, humanitarian actors seek the consent of both types of armed groups. This is also imperative because, in a highly contested area, the circumstances of territorial control can change rapidly and therefore all relevant armed groups need to be considered for the safe delivery of assistance. This book therefore argues that the legal regime must reflect practical realities and concludes that both types of armed groups must also be legally considered in the context of humanitarian relief.

Part 1 further shows that not only the actors involved in international relief operations are diverse, but also the relevant legal provisions for humanitarian relief in non-international armed conflicts are found in different branches of

international law. The main source is IHL. However, since the provisions of IHL treaty law for non-international armed conflicts are limited (compared to the provisions for international armed conflicts), the only regulations relevant to humanitarian assistance in non-international armed conflicts are found in Common Article 3 to the GCs and in Article 18 AP II. In its Study on Customary IHL, however, the ICRC concluded that many of the customary rules parallel those found in the IHL treaties. The Study also notes that a large number of customary rules, including those relating to the provision of humanitarian relief, apply to both types of conflict. Customary IHL is therefore shown to be an important complementary source for the regulation of relief in situations of non-international armed conflict.

Based on the legal framework set out in Part 1, the relevant *Rights and Duties of the Actors involved in Relief Actions* could be assessed in *Part 2*. The broadest set of rights and obligations related to the provision of assistance could be identified for the affected State on whose territory the assistance is provided. In this context, State sovereignty is a key principle that confers not only rights but also obligations on the State towards its population. This includes, in particular, the duty to provide relief when its civilian population is suffering undue hardship and is in need of supplies essential to its survival. Thus, it is the primary responsibility of the affected State to meet the needs of its civilian population. This also applies in situations of non-international armed conflict.

Having the primary role in the provision of relief also entails the duty to facilitate external assistance in situations where the affected State is not in a position to provide the relief by itself. However, by virtue of its territorial sovereignty, the affected State retains the right to decide which actor may provide relief on its territory. The requirement of the consent of the affected State for the provision of humanitarian relief on its territory is reflected for situations of non-international armed conflict in Common Article 3 and in Art. 18 (2) AP II. In this context the question arises as to whether the consent of the affected State is also required when humanitarian relief is intended for the civilian population in areas within its territory that are no longer under its control, but are effectively under the control of armed groups, and is provided directly by neighbouring States through cross-border operations. The existing legal norms do not explicitly regulate such situations. However, with regard to the territorial sovereignty and integrity of the State, this book concludes that the consent of the affected State is always required when relief is provided on its territory, whether or not the State has control over the particular area.

The general requirement of the consent of the affected State does not mean, though, that it has a deliberate right to withhold its consent. Based on its obligation to provide humanitarian relief, it is accepted as a rule of customary

law that the affected State has a duty not to withhold its consent to relief on arbitrary grounds. Conversely, this can be interpreted to mean that in cases where there is no justifiable reason for withholding consent to assistance, the affected State has (even) a duty to provide the required consent. Once consent has been given, the affected State has a further obligation to effectively enable the provision of relief by allowing entrance and facilitating the rapid and unimpeded passage of relief. As a counterpart to this obligation, the affected State may impose technical arrangements and restrictions on the movement of humanitarian personnel and relief activities within the limits set out in AP I, which apply to situations of non-international armed conflict as rules of customary IHL.

In contrast to the affected State, the duties and, in particular, the rights of non-State armed groups are the least developed and, at the same time, the most controversial in the context of non-international armed conflicts and for situations of humanitarian relief. This book argues that armed groups involved in an armed conflict are generally bound by IHL and IHRL, whether or not they have territorial control. However, the extent to which they are bound may vary according to what authority or control they do or do not have over a territory. Non-State armed groups further have the possibility to be bound by legal provisions on the basis of special commitments. As a common basis, however, it could be assessed that all armed groups are bound by the provisions of Common Article 3 to the GCs and customary IHL (which also includes the provisions of AP II) and must respect at least the fundamental human rights with regard to the affected civilian population. Based on their duty to respect the basic human rights of the civilian population concerned, it could be deduced that armed groups must also be obliged to provide humanitarian relief to the civilian population in the area they control or over which they otherwise have significant influence. Yet, the content of this obligation may vary depending on the circumstances and the capacity of the particular armed group. If the concerned armed group is not capable of providing the necessary assistance itself, its duty to provide relief (similar to that of the affected State) includes the duty to enable the provision of relief from outside.

The book argues that the provision of relief in an area controlled by an armed group, or over whose access an armed group has otherwise significant influence, requires (as with the affected State) the consent of that armed group. It is explained that obtaining the consent of such armed groups is not only necessary for practical security reasons – as applied in practice today – but also makes sense from a legal perspective. After all, in the context of armed conflict, armed groups will only respect legal regulations if they do not restrict their ability to wage effective war and opposition. Thus, if armed groups are to

be realistically expected to enable relief efforts, they must also be given legally the right to decide who can enter the territory they control or over which they otherwise have influence. Based on their duty to provide relief, however, armed groups cannot arbitrarily withhold this consent. Once they have given their consent, they have the same obligation as the affected State to allow and facilitate the delivery of relief, but based on the previous considerations, namely that they must be able to wage war and resist effectively, the armed groups must also be given the right to make technical arrangements and limitations to the provision of relief.

With respect to the legal position of international humanitarian actors, it is shown that this is limited in particular to their duty to respect humanitarian principles and their right to offer the provision of assistance. With regard to non-belligerent States, it is to be noted that they may be directly affected by humanitarian relief operations intended for the civilian population of the affected State, if the international relief operations are initiated on or have to pass through their territory. This concerns primarily non-belligerent States that are neighbouring countries of the affected State. In this role, the non-belligerent States have similar obligations and rights as the affected State regarding the entry and transit of relief convoys and goods on their territory. Finally, Part 2 of the book deals with the legal status of the affected civilians, showing that the most relevant legal pro- visions for them in the context of relief operations are their basic human rights, such as the right to life, food, and essential medicines, which must be respected by the parties to the conflict. Even though conflict parties have a duty to provide relief, it is unsettled whether civilians also have an independent and enforceable human right to receive such relief. The debate is more theoretical than practical, however, as the fundamental human rights mentioned already guarantee civilians that their needs for essential relief will be met in situations of humanitarian crisis.

Against the background of the relevant legal provisions governing the provision of assistance set out in Part 2, the issue of *Arbitrary Withholding of Consent to Relief Operations* was examined in more detail in *Part 3*, in particular the questions of what constitutes a withholding of consent to relief, where the legal basis for the prohibition of arbitrary withholding lies and, most importantly, when a withholding of consent can be considered to be arbitrary. The book first establishes that, in addition to an explicit disapproval, consent to relief can also be implicitly withheld by failing to respond to requests for relief, or by withdrawing the consent given by imposing subsequent restrictions that make the provision of relief factually impossible. It is then shown that although the prohibition of arbitrary withholding of consent to relief is recognised as a rule of customary law, there is not much said about where the respective *opinio*

iuris and practice lies. An examination of this question revealed that the *opinio iuris* on the prohibition of arbitrary withholding of consent to relief can be derived from the grammatical, effective, and historical interpretation of the APs to the GCs, and that subsequent State practice and agreements have hardened this conviction into a rule of customary international law.

Since the requirement of consent only arises when the preconditions for the provision of humanitarian relief are met, the concerned conflict party may, in situations where these conditions are not met, refuse the offered relief simply by referring to the unmet conditions. In the author's view, it would be more accurate to refer to such a response to relief at this stage as a refusal of relief rather than a withholding of consent. These two situations and terms are often confused in doctrine and practice. However, a proper distinction between the two situations is important in assessing the grounds that may justify the respective action. While a valid refusal requires only that the conditions for granting relief are not met, situations of withholding consent must be justified on the basis that there are valid reasons for not granting consent to relief. The latter justification is more complex and requires a proper analysis of the situation and, in particular, of the motives of the parties to the conflict, whereas the legitimacy of a refusal can be assessed on the basis of given, easily ascertainable external circumstances.

There is no general definition of what may amount to arbitrary withholding of consent. However, based on the various attempts in doctrine and practice to identify the circumstances and character of arbitrary withholding, this book has identified four essential elements which qualify a withholding of consent to humanitarian relief as arbitrary, namely:

- where there is no legitimate aim pursued by the withholding of consent,
- when the withholding of consent constitutes a violation of another obligation under international law with respect to the civilian population,
- when consent is withheld in a manner that violates the principles of necessity and proportionality; or
- where consent is withheld in a manner that is otherwise inappropriate.

Of practical importance are, in particular, circumstances in which the withholding of consent to relief operations may violate other international obligations that parties to a conflict should respect towards the civilian population. Other international obligations that could be violated by a withholding of consent to humanitarian relief may include obligations under IHRL, IHL and/or international criminal law. This book has identified the most common breaches of obligations that can be invoked in situations of withholding of consent to relief. Some of them are found – due to their importance – as prohibited acts in all three branches of law.

In this respect, particular mention should be made of the act of starvation, which is prohibited not only under IHRL as a violation of the fundamental right of the civilian population to food, but also under IHL and as a war crime under the Rome Statute when used as a method of warfare. The specificity of this offence is that it explicitly mentions the obstruction of relief as a possible means of causing starvation. It is the only prohibition currently found in international law that explicitly refers to relief operations and considers their obstruction to be a wrongful act, although it additionally requires that the obstruction must be carried out with the intention of causing starvation and that it must be used as a method of warfare. Nevertheless, it is the offence most likely to be invoked in situations of arbitrary withholding of consent to relief. It was therefore an important step forward when, in December 2019, after years of criticism and doctrinal debate, starvation was finally adopted as a war crime under the Rome Statute, which can also be committed in non-international armed conflicts.

How can the infringements caused by the arbitrary withholding of consent to relief be invoked? This question is addressed in *Part 4* of this book under *Legal Consequences of Arbitrary Withholding of Consent*, where the possibilities of holding the parties to the conflict responsible are explored. In this respect, it is striking that the possibilities to hold armed groups responsible are considerably limited compared to those against the affected State. At present, there is no provision for holding non-State armed groups directly and as an entity liable under international law.

A question that has been widely debated in recent years in the context of arbitrary withholding of consent is whether humanitarian actors should have the right to provide assistance in such situations without the consent of the concerned conflict party. Doctrine has identified three (theoretical) situations in which the provision of humanitarian relief without consent may be exceptionally justified, namely:

– when such relief actions are imposed by the UN Security Council through a binding resolution based on Chapter VII of the UN Charter,
– when the principle of necessity can be invoked,
– or when relief actions are applied as countermeasure against the affected State.

Although the latter two situations could in theory eliminate the unlawfulness of providing humanitarian assistance without consent, there are no examples of their application in practice. The reason for this may lie in the fact that legal arguments alone cannot alleviate the security concerns of humanitarian actors. Acting on the basis of an authorisation in a Security Council resolution therefore appears to be the safest way for humanitarian actors to provide

assistance without consent. Such authorisation was provided by the Security Council in its Resolution 2165 (2014), when it decided that UN humanitarian agencies and their implementing partners could provide relief to the Syrian population through certain cross-border routes without the consent of the Syrian Government. Since then, however, the Security Council has not adopted any similar resolutions. Furthermore, in 2020, three of the four border crossings originally authorised for assistance under 2165(2014) were not renewed due to vetoes by Russia and China, and in July 2023, the renewal of the remaining one border crossing also failed following a veto by Russia. This event (once again) underlined the reliance of the Security Council on the goodwill of its permanent members to adopt politically controversial resolutions, and that political tensions can limit the Security Council's ability to act in precarious situations. Although non-belligerent states would have a strong legal remedy against arbitrary denial of consent in the form of the Security Council resolution, the effectiveness of this mechanism suffers due to its political susceptibility. However, non-belligerent States also have other avenues to act in situations of arbitrary withholding of consent. Based on their duty under Common Article 1 of the Geneva Conventions to ensure respect for IHL, it is argued that they have not only a right but an obligation to act against situations of arbitrary withholding of consent.

Part 4 ends with an overview of the remedies available to the affected civilians and concludes that they are unsatisfactory. In contrast to non-belligerent States, the remedies available to civilians are limited. Moreover, existing complaint mechanisms only allow for individual complaints, which are not an adequate form of remedy in situations of armed conflict (where there are large numbers of affected individuals).

The findings from the previous parts show a clear picture: a quick and effective response to situations of arbitrary withholding of consent is currently not possible. Against this background, *Part 5* of the book identifies the *existing legal gaps and required developments* to better address the existing shortcomings. Three main problems have been identified that need to be addressed through further legal developments:

(1) *The law governing humanitarian relief*. The existing regulations are not known because there is no comprehensive written legal instrument containing all the relevant provisions and accessible to all actors involved in relief operations. There is also uncertainty about the applicability of IHL rules, as there is no binding decision on when internal tensions amount to a non-international armed conflict. The content of the relevant provisions also requires some clarification. For example, the arbitrary withholding of consent is not explicitly addressed by any binding

legal provision. Nor is there any definition of what might constitute arbitrary withholding of consent. But even if the elements of arbitrariness were clear, it would still be a difficult task to determine whether a situation is arbitrary or not, since a proper assessment requires knowledge of the factual circumstances in the country. Such an assessment cannot therefore be made at a distance. To overcome these difficulties, the book proposes:

- to enhance knowledge of the applicable law through dissemination;
- to encourage frequent discussions between States in regular meetings. In this respect, the lessons learned from the Swiss/ICRC Initiative could be utilised;
- To clarify the content of existing regultions on humanitarian assistance in non-international armed conflicts in documents (binding or non-binding) that are easily accessible to all actors involved in relief operations, including the civilian population;
- and finally, to mandate an international, independent body with the task to monitor and assess situations of arbitrary withholding of consent to relief. In order to make a determination, this body should be able to form an opinion on the ground and therefore be allowed into conflict areas. This could, for example, be a new mandate for the International Fact Finding Commission.

(2) *The legal status of the non-State armed groups*. It is still unclear whether and to what extent non-State armed groups are bound by international law. Moreover, the question of whether armed groups should enjoy rights in addition to obligations is not addressed at all in these discussions. The author argues that if armed groups are to fulfil their obligations, it is essential that they are guaranteed certain rights in return. This is particularly important in armed conflicts, where IHL should provide rules that enable both parties to the conflict to wage war effectively. However, it is difficult to define the rights and obligations of armed groups if they are not recognised as subjects of international law.

Another current problem is the exclusion of armed groups from the law-making process. Yet, in order to improve implementation and compliance, it is necessary to also hear and understand the views of those affected by a law. This will give armed groups not only some ownership of the regime and a greater willingness to respect it, but will also allow the international community to adopt rules that are actually practicable. Finally, it is also unsatisfactory that only members of a non-State armed group can be held legally accountable, but not the armed group as an

entity. In this way, the injustice manifested by the armed group through its actions as a collective is not addressed. It is therefore suggested:

– to acknowledge non-State armed groups as subjects of international law with obligations and also rights;
– to integrate non-State actors in the law-making process;
– and to establish direct responsibility for non-State armed groups.

With regard to the subjectivity of non-State armed groups, the author stresses that the concept of legal subjectivity should not be confused with legitimacy. The recognition of armed groups as subjects of international law does not confer legitimacy on their existence or objectives, but rather enables their actions to be legally perceived and their violations to be identified. According to the author, the exclusion of armed groups as subjects of international law is an outdated view based on false fears that adds no value but only complicates the legal encounter with today's reality.

(3) *Legal remedies.* The currently existing law enforcement mechanisms are not sufficient to respond effectively and timely to situations of arbitrary withholding of consent to relief operations. In particular, the efforts of the Security Council can be undermined by vetoes by its permanent members. Another problem is the enforcement of arbitrary withholding of consent to humanitarian relief as a criminal offence. As the Rome Statute does not recognise arbitrary withholding of consent as a separate offence, it is difficult to prosecute before the ICC. Finally, the existing remedies available to the affected civilians are not only limited, but also inadequate for situations of arbitrary withholding of consent, where large numbers of civilians are affected by the violation. Steps that could be taken to fill these gaps are:

– (based on doctrinal discussions) introduction of the possibility for the UN General Assembly to authorise humanitarian relief operations in situations where Security Council decisions could be blocked by vetoes. Although such resolutions do not have the same binding effect as Security Council resolutions, they can reflect the majority opinion of States and can therefore have an important political impact on the behaviour of parties to a conflict.
– inclusion of arbitrary withholding of consent to relief as a separate crime in the Rome Statute;
– establishment of a special commission to which civilians could appeal without significant obstacles and which could deal with collective complaints from affected civilians and thus determine the extent of collective suffering.

2 Closing Remarks

In recent years, the arbitrary withholding of consent to humanitarian relief actions has received more attention in practice and doctrine. While this is encouraging, discussions on this issue need to continue. Much remains to be clarified and established. The existing uncertainties about the legal situation of arbitrary withholding of consent impede an effective response by the international community. To be effective, the law must reflect the existing reality. Unfortunately, this is not yet the case. The arbitrary withholding of consent to relief operations needs to be explicitly addressed as a legal problem in the existing rules governing non-international armed conflict. In this respect, the perception and understanding of non-State armed groups must be taken into consideration. Armed groups today exercise governmental-like authority in many places and have significant influence over access to millions of people around the world. Non-State armed groups must therefore be included in the discussion on how the arbitrary withholding of consent to relief can be legally and effectively regulated. At the same time, it is important that those responsible for violations – whether armed groups or States – are actually held accountable. This requires that existing enforcement mechanisms are applied and that new developments are pursued where legal gaps exist.

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Arbitrary Withholding of Consent to Humanitarian Relief in Non-international Armed Conflict

Legal Regulations and Consequences

Vijitha Veerakatty

How to legally assess the situation when humanitarian actors in non-international armed conflicts are arbitrarily denied access to the affected civilian population? The book answers this question from the perspective of the five main actors involved in humanitarian relief in non-international armed conflicts: the affected State, non-State armed groups, humanitarian actors, non-belligerent States and the affected civilian population. It examines the legal regulations and consequences for each of these actors. In doing so, the book not only draws attention to existing legal gaps and challenges, but also encourages readers to rethink outdated legal concepts and discuss new approaches.

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