

ICRC Q&A and lexicon on humanitarian access

A considerable number of countries have been the theatre of armed conflicts - whether inter-state or non-international - with all the devastation and suffering that these entailed, chiefly among the civilian population. Indeed, civilians continue to be the primary victims of violations of international humanitarian law (IHL) committed by both State parties and non-state armed groups. Recurring violations in hostilities include deliberate and indiscriminate attacks against civilians, the destruction of infrastructure and goods indispensable to their survival, and the forcible displacement of the civilian population. All too frequently, civilians lack basic supplies and services, such as food, water and healthcare.

The primary responsibility for the security and well-being of a civilian population rests with States and parties to the conflicts. In addition, impartial humanitarian organisations such as the ICRC may offer their services and be authorized to undertake relief operations in favour of victims of an armed conflict. The complementary role of these organisations is often crucial for those affected by armed conflict.

The ICRC is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. In order to be able to implement its mission, the ICRC - like any other impartial humanitarian organizations - needs to access the areas affected by violence in order to reach persons in need of protection and assistance. This physical access is critical to be able to assess victims' needs independently and to address them in an impartial manner.

In situations of armed conflict, access to the victims thereof is regulated by IHL. The rules of IHL regulating humanitarian access must be respected by all parties to an armed conflict. In that framework, offers of services by an impartial humanitarian organisation such as the ICRC cannot be interpreted as interference in States' internal affairs, nor as a recognition or a support to a party to the conflict. Yet, parties to armed conflicts sometimes explicitly refuse access altogether or to certain areas. They might also implicitly/indirectly prevent access, for instance by creating legal, administrative and other practical obstacles impeding humanitarian action. In other cases, it is the absence of minimum conditions of security that prevents the access of humanitarian personnel to individuals in need. This absence of security may materialize in worst cases in direct threats and attacks against humanitarian personnel.

There are different underlying reasons for recent constraints on humanitarian access. One of them is a growing perception over the last years that humanitarian aid has become more and more politicized.

This is why the ICRC constantly seeks to remind and convince parties that its humanitarian action is apolitical and abides in all circumstances by the principles of neutrality, impartiality and independence. It has also repeatedly called over the years for respect for IHL provisions related to humanitarian access.

A short Q&A is followed by a more detailed lexicon of legal expressions and terms. Selected provisions of IHL are included in an annex.

1. What causes limitations to humanitarian access?

Constraints or limitations imposed on humanitarian access may have different causes.

Security-related concerns are among the main reasons limiting humanitarian access. When hostilities are on-going, or when humanitarian relief operations are deliberately targeted, it is extremely difficult to reach populations in need. The security situation may lead humanitarian organizations to either withhold from or scale down their operations in specific contexts or to hire security providers. This problem highlights how important the obligation to respect and protect humanitarian relief personnel is.

In some cases, denial of consent for humanitarian action or constraints imposed on the delivery of relief schemes in the field may also be part of a military strategy aimed at depriving of essential supplies the adversary and/or the civilian population.

Another important constraint on humanitarian access is a growing perception over the last years that humanitarian aid has become more and more politicized. This is notably due to the discussion around the notions of ‘humanitarian intervention’ or ‘responsibility to protect’, on which there is no consensus in the international community and which are not to be confused with humanitarian activities¹. Moreover, certain international operations have followed ‘integrated’ or ‘comprehensive’ approaches, combining political, military and humanitarian objectives.

In some contexts, these developments have raised doubts about humanitarian actors’ real objectives and can contribute to eroding the perception of, and confidence in these actors. Humanitarian organizations therefore experience greater difficulties to convince parties to an armed conflict of their true intent, which is to provide humanitarian relief to persons in need or having a protection² dialogue without any connection to political or military purposes. These doubts about humanitarian action lead some parties to armed conflicts to restrict or forbid humanitarian access or, worse, to expose them to threats or attacks.

2. How is the ICRC addressing these restrictions of access?

The ICRC has always raised concerns about the risks of these approaches combining political, military and humanitarian objectives and distances itself from such initiatives in particular when they are implemented in highly polarized environments. In order to preserve its independent, neutral and impartial humanitarian action, the ICRC remains committed to its distinct approach of building a constructive dialogue and relationships with all relevant parties in a confidential manner, to promote trust and support for its activities, and to reach agreement with the parties about them.

¹ For more details on the notion of “humanitarian activities”, see Lexicon below.

² ICRC’s definition of “protection” is the following: “In order to preserve the lives, security, dignity, and physical and mental well-being of victims of armed conflict (...), protection aims to ensure that authorities and other actors fulfil their obligations and uphold the rights of individuals. It also tries to prevent or put an end to actual or probable violations of international humanitarian law or other bodies of law or fundamental rules protecting people in these situations. It focuses first on the causes or circumstances of violations, addressing those responsible and those who can influence them, and second on the consequences of violations.” ICRC’s “protection” activities are implemented following four main guiding principles: neutral and independent approach; dialogue and confidentiality; holistic and multidisciplinary character of ICRC action; search for results and impact. See ICRC’s Protection policy, International Review of the Red Cross, Volume 90, Number 871, September 2008, <http://www.icrc.org/eng/resources/documents/article/review/review-871-p751.htm>

This approach notably aims at persuading the parties to comply with their legal obligations and to accept ICRC humanitarian activities, such as visiting persons deprived of their liberty. The latter kind of activities and the dialogue sought for by the ICRC can certainly not be undertaken if the ICRC were perceived as pursuing political objectives or if it were acting without the consent of the parties to the conflict concerned.

The ICRC calls on all parties to armed conflicts to respect IHL and reminds them that the Geneva Conventions (GCs) have been universally ratified, indicating a consensus on the obligations of States to assist and protect their civilian populations against the effects of conflict and to grant access to impartial humanitarian actors during armed conflict when those populations are in need. Where warranted, it also recalls that States have undertaken an obligation to ensure respect for the Geneva Conventions. It means that all States must do everything in their power to put an end to violations of IHL, among others by exercising their influence over those who violate its provisions.

3. What is ICRC's position regarding cross-border operations?

The ICRC seeks, in dialogue with all parties concerned and in light of the realities on the ground, to address impartially the needs that it has identified. "Cross-border" operations are only one among other ways of accessing people in need.

For itself, the ICRC has always considered cross-border operations to be a possibility, as long as they could be carried out in full transparency with the parties to the armed conflict and with the other States concerned. As such, "cross-border operation" is not per se an IHL expression. It only constitutes a form of humanitarian relief operations regulated by the same IHL rules as any other impartial humanitarian operations, which notably require the consent of States concerned.³

Therefore, the ICRC seeks to operate with the consent of the States concerned, including the relevant neighbouring countries. Operating with such consent is the best way to ensure effective action and to avoid exposing its teams to additional security risks.

4. Are the ICRC's concerns about humanitarian access recent, or linked to specific contexts?

The ICRC has repeatedly called for the respect of the provisions of IHL in the situations of armed conflict in which it is working throughout the world. Over the last years, the ICRC publicly expressed the need to have safe, rapid and unimpeded humanitarian relief to those in need in many conflict situations on all continents. The general call for humanitarian access and respect for the humanitarian mission has also been made repeatedly at the meetings of the International Red Cross and Red Crescent Movement and in other international fora.⁴

³ More details on these IHL rules governing humanitarian access can be found at the question 5 and 6 and in the Lexicon below.

⁴ See Council of Delegates 1991, Resolution on humanitarian assistance in situations of armed conflicts; Council of Delegates 1993, Resolution on the principles of humanitarian assistance; International Conference of the Red Cross and Red Crescent 1995, Resolution on protection of the civilian population in period of armed conflict; International Conference of the Red Cross and Red Crescent 1999, Plan of Action for the years 2000–2003; International Conference of the Red Cross and Red Crescent 2011, Resolution 2 "Plan of Action for the years 2012–2015", 31C/11/R2, ICRC Statement at the UN ECOSOC, 17 July 2013; ICRC Statement to the UN Security Council on the Protection of civilians, 22 August 2013.

Despite these appeals, impartial humanitarian organizations have been experiencing increasing difficulties in accessing vulnerable populations in situations of armed conflict, due to security risks (exposure of personnel to threats or attacks), denial of access and various political, legal or practical restrictions (geographic restrictions, curtailment of certain types of activities, and/or administrative obstacles). These restrictions are seriously hampering their capacity to operate. Ultimately, this means that victims of armed conflicts do not always receive the basic assistance to which they are entitled such as food, shelter, water, health care, and to see their protection problems addressed.

5. What are the rules of IHL dealing with humanitarian access?⁵

By ratifying the GCs and other IHL treaties such as the Additional Protocol to the GCs (APs), States have undertaken to implement their legal obligations in good faith and in particular to respect and ensure respect for IHL (Common Article 1 GCs).

IHL treaties and customary IHL contain specific rules governing relief and protection in favour of those in need,⁶ be they civilians, sick and wounded fighters or be they any other category of victims of armed conflict.

Although these rules vary slightly depending on the nature of the conflict (international armed conflict other than occupation, occupation and non-international armed conflict), the IHL framework regulating humanitarian access mainly revolves around four main stages:

1. Each Party to the armed conflict bears the primary obligation to meet the needs of the population under its control;
2. Impartial humanitarian organizations have a right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population affected by the armed conflict are not fulfilled;
3. Impartial humanitarian activities undertaken in situations of armed conflict are subject to the consent of the parties to the conflict concerned.⁷ Under IHL, the parties to the conflict concerned must consent to such activities when the needs of the population under their control are not met; and
4. Once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict as well as all States which are not a Party to the armed conflict concerned must allow and facilitate rapid and unimpeded passage of these relief schemes, subject to their right of control.

⁵ See also below a lexicon and a list of relevant IHL provisions.

⁶ For international armed conflict other than occupation, the most relevant IHL provisions are: Art. 9/9/9/10 of the GCs, Art. 17 and 23 of the GCIV, Art. 68 to 71 and 81 of API. In situation of occupation, the most relevant provisions are Art. 59 and 61 of the GCIV and Art. 69 and 71 of API. Lastly, in situation of non-international armed conflict, the relevant norms are common Art. 3(2) to the GCs and Art. 18 of APII. See also J.M. Henckaerts/L. Doswald Beck, Customary International Humanitarian Law, Vol. I, ICRC, Cambridge University Press 2005 (hereinafter ICRC Study on customary IHL) rules 55 and 56 applicable in both international and non-international armed conflicts,

⁷ In situation of non-international armed conflict, only the consent of the state party to the conflict is required by IHL. More details on this notion of consent are provided in the Lexicon.

Other relevant IHL provisions are those related to the respect and the protection of humanitarian and medical relief personnel and objects,⁸ and to the prohibition to use starvation of the civilian population as a method of warfare.⁹

6. Do the rules of IHL themselves impose restrictions on humanitarian access?

IHL does not provide an unfettered right of access to all impartial humanitarian organisations in order to carry out every kind of activity unconditionally. IHL requires first that the offer of services made by an impartial humanitarian organization be accepted by the party to the conflict concerned before the former can operate in the territory under the control of the latter.¹⁰ However, the decision of the party concerned to consent to relief schemes in its territory is - under IHL - not discretionary.¹¹

Once consent has been given, relief schemes must be allowed and facilitated by all parties and states concerned, even if the relief is intended for the population under the control of the enemy. However, this does not mean that impartial humanitarian organizations - once allowed in the territory of the party concerned - are at liberty to operate without any constraints.

While discharging their obligation to allow and facilitate relief operations, the parties and states concerned are entitled to exert a right of control over the humanitarian operations and prescribe technical arrangements. In any case, the right of control recognized by IHL should not unduly delay humanitarian operations, impede their rapid deployment or make their implementation impossible.

In this regard, it is worth noting that the military necessity argument can be invoked in exceptional circumstances in order to regulate – but not prohibit – humanitarian access and can only *temporarily* and *geographically* restrict the freedom of movement of humanitarian personnel.

Military necessity cannot be used under IHL to turn down a valid offer of services and to deny in their entirety the humanitarian activities proposed by impartial humanitarian organizations.

⁸ In situations of international armed conflict, the most relevant IHL provisions are: Art. 12, 15, 21, 70-71 of API. In situations of non-international armed conflict, the most relevant IHL provisions are: Art. 9(1) and 11(1) of APII. See also ICRC Study on customary IHL Rules 25 and 28-32.

⁹ In situations of international armed conflict, the most relevant IHL provision is Art. 54(1) of API. In situations of non-international armed conflict, the most relevant IHL provision is: Art. 14 of APII. See also Rule 53 of the ICRC Study on customary IHL.

¹⁰ When impartial humanitarian organisations are directly solicited by the parties to the armed conflict, their consent is of course presumed.

¹¹ The IHL rules governing consent vary in their scope and wording. For instance, in situation of occupation, Art. 59 of the GCIV states that “if the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf the said population, and shall facilitate them by all the means at its disposal”. In other words, the occupying power is bound to accept the offer of services when it is unable to fulfil its primary obligation to meet the needs of the local population.

LEXICON OF EXPRESSIONS & TERMS IHL Rules on Humanitarian Access

Each Party to the armed conflict bears the primary obligation to meet the needs of the population under its control

Impartial humanitarian organizations have a right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population affected by the armed conflict are not fulfilled

Impartial humanitarian activities undertaken in situations of armed conflict are subject to the consent of the parties to the conflict concerned. Under IHL, the parties to the conflict must consent to such activities when the needs of the population under their control are not met

Once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict as well as all States which are not a Party to the armed conflict concerned must allow and facilitate rapid and unimpeded passage of these relief schemes, subject to their right of control.

The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted.

Humanitarian relief personnel, and objects used for humanitarian relief operations, must be respected and protected.

This lexicon explains the meaning of key expressions and terms used in the international humanitarian law (IHL) rules regarding humanitarian access. In practice of course, these terms must be read as a whole as used in the context of applicable IHL rules.

IHL provides specific rules for humanitarian relief operations both in international armed conflicts (IAC) and in non-international armed conflicts (NIAC). These rules are not applicable outside the context of armed conflicts.

“Each party to the conflict bears the primary obligation to meet the needs of the population under its control”:

The responsibility of a state to meet the needs of a population under its control is generally accepted as a corollary of state sovereignty. This **“primary obligation to meet the needs”** has been also expressly transposed in the IHL rules governing occupation for the occupying power.¹² IHL provisions governing IAC (other than occupation) and NIAC do not specifically contain a similar rule. However, in such situations, the responsibility of the parties to conflict to meet the needs of the population under their control can be inferred from the object and purposes of IHL.

The adjective **“primary”** means that the obligation is first and foremost incumbent upon the parties to the conflict. The fact that IHL foresees that others such as impartial humanitarian organizations can step in - under certain conditions - in order to offer relief to the populations affected by armed conflicts in no way diminishes the primary responsibility of parties to the conflict to meet the needs of those under their control.

“Impartial humanitarian organizations have a right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population affected by the armed conflict are not fulfilled”:

With Article 3, second paragraph, and Article 9/9/9/10 common to the GCs establishing the so-called right of humanitarian initiative, States have expressly recognized that impartial humanitarian organizations such as the ICRC may have an important role to play in addressing the humanitarian needs generated by armed conflicts. This right concretely allows those organizations to offer their services and to perform humanitarian activities in armed conflict settings.

Public international law, including IHL, has overtime recognized that these offers of services made by impartial humanitarian organization cannot be regarded as unlawful interference in domestic affairs of a state nor can they be seen as an unfriendly act. In this regard, it is critical not to confuse the offers of services and the subsequent humanitarian relief operations conducted by impartial humanitarian organizations with the so-called “right to humanitarian intervention” or “Responsibility to Protect” concepts. The latter notions are distinct from humanitarian activities carried out by impartial humanitarian organization within the framework set by IHL.

Under IHL, only **“impartial humanitarian organizations”** are entitled to make offers of services.

For the purposes of IHL, the organizations wishing to offer their services must therefore be **“humanitarian” and “impartial”**.

¹² Art. 55 of GCIV and 69 of API.

The adjective “**humanitarian**” is self-explanatory, it indicates that the organization follows only humanitarian objectives and acts in particular for the survival, well-being and dignity of those affected by armed conflicts.

The adjective “**impartial**” refers to the attitude of the humanitarian organizations which is to be adopted vis-à-vis the victims of the armed conflict when planning for, and implementing, the proposed humanitarian activities. Impartiality refers to the requirement not to make any discrimination as to nationality, race, religious beliefs, class or political opinions or, for that matter, any other similar criteria. Further, the fundamental principle of impartiality requires endeavouring to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.¹³

Also, IHL does not specifically define the notion of “**humanitarian activities**” that impartial humanitarian organizations may offer to the parties to an armed conflict. Common Article 9/9/9/10 of the GCs applicable to IAC specifies that the ICRC and any other impartial humanitarian organization can offer to undertake humanitarian activities for the *protection* and the *relief* of those affected by armed conflict. Common Article 3 to the GCs only refers to “services” but one should consider that the right of initiative applicable in NIAC also includes all humanitarian activities. Humanitarian activities that can be offered within IHL meaning have therefore a protection¹⁴ and relief¹⁵ dimension. Both work towards the same objective: safeguarding the life and dignity of the victims of armed conflicts. Therefore, in the context of an armed conflict, humanitarian activities are all the activities that seek to preserve the life, security, dignity and mental and physical well-being of victims of the conflict, or which seek to restore the said well-being if it has been infringed upon.

The humanitarian activities referred to under IHL must benefit *all* those affected by an armed conflict. This broad interpretation as to who can be the beneficiary of humanitarian activities means that the latter are not limited to civilians but may also include for instance wounded and sick fighters or prisoners of war and other persons deprived of their liberty.

¹³ As a matter of good practice, this definition is not only followed by the components of the International Red Cross and Red Crescent Movement, but also by actors outside the Movement.

¹⁴ ICRC’s definition of “protection” is the following: “In order to preserve the lives, security, dignity, and physical and mental well-being of victims of armed conflict (...), protection aims to ensure that authorities and other actors fulfil their obligations and uphold the rights of individuals. It also tries to prevent or put an end to actual or probable violations of international humanitarian law or other bodies of law or fundamental rules protecting people in these situations. It focuses first on the causes or circumstances of violations, addressing those responsible and those who can influence them, and second on the consequences of violations.” ICRC’s “protection” activities are implemented following four main guiding principles: neutral and independent approach; dialogue and confidentiality; holistic and multidisciplinary character of ICRC action; search for results and impact. See ICRC’s Protection policy, International Review of the Red Cross, Volume 90, Number 871, September 2008, <http://www.icrc.org/eng/resources/documents/article/review/review-871-p751.htm>

¹⁵ As used in the Geneva Conventions, the term ‘relief’ is mostly aimed towards addressing emergency situations. It needs to be read jointly with the broader term ‘assistance’, used in Article 81(1) of API and which seeks to cover additionally the longer term as well as the recurrent and even chronic needs. Neither relief nor assistance have been defined in the aforementioned treaties. The absence of a generic definition, or of a list of specific activities which would be covered by the term ‘assistance’, is in line with the fact that what may be needed in terms of humanitarian assistance in one context will not necessarily be needed in another context and may evolve over time. Assistance activities refer to all activities, services, and delivery of goods, primarily in the fields of health, water, habitat and economic security and which seek to ensure that persons caught up in an armed conflict can survive and live in dignity

If IHL provides for the right of impartial humanitarian organizations to offer their services, this body of law however does not create an obligation incumbent upon those organizations to offer their services and to undertake humanitarian activities. These organizations therefore retain their discretion for engaging in any particular armed conflict.

“In particular when the needs of the population affected by the armed conflict are not fulfilled”:

While humanitarian organizations will often offer their services in acute situations, they may also do so at any other time, in particular in order to carry out preventive activities. Nothing in the relevant provisions of IHL may be interpreted as restraining the right of impartial humanitarian organizations to offer their humanitarian services to the parties to an armed conflict. Conversely, at all times, nothing precludes a Party to an armed conflict from approaching the ICRC, or another impartial humanitarian organization, to ask whether it would be willing to undertake humanitarian activities.

“Impartial humanitarian activities undertaken in situations of armed conflict are subject to the consent of the parties to the conflict concerned”.

If IHL grants to impartial humanitarian organizations a right to offer their humanitarian services, this right should not be interpreted as constituting an unfettered right of humanitarian access (i.e. a right of actually being guaranteed to be able to undertake the proposed humanitarian activities). Whether impartial humanitarian organisations will effectively be able to provide their services in areas plagued by armed conflict will depend on their receiving **“consent”** by the parties to the conflict concerned.

The IHL rules governing consent vary in their wording and scope.¹⁶ However, be it in IAC (including in situation of occupation) or NIAC, the consent of the parties to the armed conflict concerned must be obtained before impartial humanitarian organizations can operate and undertake their humanitarian activities in the territories under their jurisdiction/control. Therefore, before undertaking the humanitarian activities proposed, impartial humanitarian organizations must seek and obtain the consent of the party to the armed conflict concerned.¹⁷

In IAC (including occupation), the relevant IHL provisions¹⁸ indicate that consent only needs to be obtained from those states which qualify as party to the IAC and which are “concerned” by virtue of the fact that the proposed humanitarian activities are to be undertaken on their territory (it being

¹⁶ See common Art. 9/9/9/10 of the GCs and Art. 70(1) of API for IAC; Art. 59 of the GCIV for occupation and Art. 18 of APII for NIAC.

¹⁷ It is without saying that when impartial humanitarian organisations are directly solicited by the parties to the armed conflict, their consent is presumed.

¹⁸ Common Art. 9/9/9/10 of the GCs and Art. 70(1) of API. Art. 59 of the GCIV for occupation.

understood that the opposing Party does not need to be asked for consent to relief schemes when the latter take place in the territory of the adversary or in the territory controlled by the adversary).

In NIAC, common article 3 to the GCs is silent on the identity of who should consent to humanitarian relief operations. However, the question as to whose consent needs to be obtained in NIACs governed only by common Article 3 can only be answered based on a careful consideration of the relationship between this provision and Article 18(2) of APII, which expressly requires the consent of the High Contracting Party, i.e. the State party to the conflict. On this basis, *as a matter of IHL*, consent is to be sought from the State in the territory of which the NIAC takes place, and this also with regard to relief activities which are to be undertaken in areas over which the State in question has lost control to the opposing party.¹⁹ In any case, for practical reasons, the ICRC would also seek the consent of parties to the NIAC concerned (including non-state armed groups party to it) before carrying out its humanitarian activities.

While the implementation of humanitarian activities depends upon the consent of the parties to the conflict concerned, the decision of the latter to consent to relief schemes is - under IHL - not discretionary. As always, IHL strikes a careful balance between states' interests and humanitarian imperatives. Therefore, current IHL is not entirely deferential to State sovereignty when it comes to relief schemes.

“Under IHL, the parties to the armed conflict must consent to such activities when the needs of the population under their control are not met”:

Whether a party to an armed conflict can lawfully turn down an offer of humanitarian service is intrinsically linked to its ability to fulfil its primary obligation to meet the needs of the population under its control. When a party to an armed conflict is unable or unwilling to fulfil its primary obligation to meet the needs of its population and when offers of services have been made by impartial humanitarian organizations, there are no more valid/lawful grounds to withhold or deny consent to the undertaking of humanitarian activities. Therefore, there are circumstances under IHL in which a party to the conflict is obliged to grant its consent to an offer of services.

It is important to underline that, under IHL, imperative military necessity is not a valid ground for a general and definitive denial of consent to humanitarian activities. An offer of services can be declined by the parties to the conflict when there are no needs to meet and/or when the offer of services is not humanitarian in nature or does not emanate from an organization being impartial and humanitarian in character. IHL does not foresee other grounds justifying a general refusal to consent to relief schemes.

¹⁹ IHL reflects that the notion of consent in the context of relief operations is intrinsically linked to the notion of State sovereignty.

The expression “arbitrary denial/withholding of consent to relief operations” has been sometimes used in order to describe the situation in which a party to an armed conflict rejects a valid offer of services triggered by the existence of needs to be fulfilled.

No IHL provisions contain the expression “arbitrary denial/withholding of consent”, nor does this body of law define this notion. However, it may be argued that a refusal to grant consent entailing a violation of the party to the conflict’s own IHL obligations may constitute an unlawful denial of access for the purposes of IHL. This would be the case for instance when a party to an armed conflict’s refusal results in starvation of civilians as prohibited by Article 54 of API or where it is incapable of providing the necessary humanitarian assistance to a population under its control as required by the relevant rules of international law, including IHL.

IHL also does not explicitly regulate the consequences of an unlawful denial of consent and thus does not spell out a general right of access derived from a so-called arbitrary/unlawful denial of consent. Therefore, the argument according to which such an arbitrary/unlawful denial of consent would justify as a matter of IHL unconsented-to cross-border operations does not reflect current IHL.

At the same time, IHL does not prohibit individual States and the international community as a whole to take appropriate measures – in conformity with the applicable rules of public international law – to ensure and facilitate the undertaking of impartial humanitarian operations in countries plagued by armed conflict. Such measures may also be in accordance with the states’ obligation to ensure respect for IHL as specified in common Article 1 to the Geneva Conventions.

“Once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict as well as all States which are not a Party to the armed conflict concerned must allow and facilitate rapid and unimpeded passage of these relief schemes, subject to their right of control”.

IHL makes a distinction between the requirement to obtain consent from a party to the armed conflict following an offer of services (i.e the broad decision made by that party according to which impartial humanitarian organization can be present and operate in its territory/territory under its control following a valid offer of services) on the one hand, and the obligation to allow and facilitate relief schemes, which aims at *implementing* the acceptance of the offer of services, on the other. The obligation to allow and facilitate is therefore an obligation conditioned by and directly deriving from the consent to the offer of humanitarian services previously given by the parties to armed conflict concerned.

“Must allow and facilitate”

Once relief actions are accepted in principle, the States/parties to an armed conflict are under an obligation to cooperate, and to take positive action to facilitate the operations.²⁰ The parties must facilitate the tasks of relief personnel.²¹ This may include simplifying administrative formalities as much as possible to facilitate visas or other immigration issues, financial/taxation issues, import/export, field trip approvals, and possibly privileges and immunities necessary for the organisation’s work; in short ‘all facilities’ needed for the organisation to carry out its agreed humanitarian functions appropriately.²² Measures must be also taken for the overall efficacy of the operations (e.g. time, cost, safety, appropriateness). This may include the organization being able to undertake its operation – where possible - in the most direct and safe way, which may be across borders in some circumstances.

The parties must also facilitate the relief by respecting and protecting relief consignments and humanitarian personnel, and not attacking them or diverting them (*see ‘respect and protect’*) and facilitating their rapid distribution (*see ‘rapid’*).²³ Forces must be informed about humanitarian relief convoys and their obligation to respect and protect them, and for example, instructed regarding their facilitated passage through checkpoints.

In certain circumstances, facilitation by the parties includes encouraging and facilitating effective international coordination of relief actions.²⁴

In addition, IHL foresees specific rules requiring States to facilitate in every possible way the humanitarian activities carried out by the ICRC as well as those undertaken by national Red Cross or Red Crescent societies.²⁵

Under the law governing IAC, this obligation to allow and facilitate not only applies to the parties to the armed conflict but also to all the States concerned. This means that States not party to the armed conflict through the territory of which the impartial humanitarian organizations may pass in order to more efficiently reach conflict zones, in which humanitarian activities are to be delivered, must authorize them to transit through and to use their own territory.²⁶

The law governing NIAC does not expressly contain a similar obligation to allow and facilitate relief operations binding upon states which are not party to the NIAC. However, there are expectations that states not party to the NIAC would not oppose the use of their territory by impartial humanitarian organisations in order to reach the victims of the NIAC. If those States were to refuse to allow and facilitate relief schemes, it would in effect preclude the humanitarian needs of the victims of an armed conflict to be addressed and thus render the consent given by the parties to the conflict to the offer of services void.

²⁰ Commentary to Art. 18 of APII, § 4888.

²¹ Commentary to Art. 71 of API, § 2892; Art. 18 of APII § 4869 and 4888.

²² See *inter alia* Resolution 2, "4-Year Plan of Action", Objective 1, adopted by the 31st International Conference of the Red Cross and Red Crescent, 31C/11/R2, 28 Nov-1st Dec. 2011.

²³ Art. 70(4) of API. See also, Commentary, Art. 18 of APII § 4888.

²⁴ Art. 70(5) of API.

²⁵ Art. 81 (1), (2) and (3) of API.

²⁶ Art. 23 of GCIV, Art. 70(2) of API and rule 55 of ICRC Study on customary IHL.

‘Rapid’

Once relief actions are accepted in principle, parties must facilitate their rapid distribution,²⁷ and not arbitrarily delay the forwarding of relief consignments,²⁸ in order for the aid or services to be received in a timely manner taking into account the circumstances, including the needs of the population.

Some delay for reasons of checks/control of the operations are acceptable (*see ‘right of control’*) and in the exceptional case of imperative military necessity, the movement of humanitarian personnel may be temporarily restricted.²⁹ (*see ‘unimpeded’*)

In certain instances, for example in some Security Council resolutions, the term ‘timely’ is used. It is important to stress that such wording cannot displace the IHL-obligation to facilitate ‘rapid’ access.

‘Unimpeded’

‘Unimpeded’ means that the passage of the relief, as well as the personnel accompanying it or carrying out other humanitarian services, must not be arbitrarily stopped, obstructed or hindered in the delivery of relief supplies to persons in need. Clearly, humanitarian relief personnel and objects must also never be attacked (*see ‘respect and protect’*).

Only in case of imperative military necessity may the activities and movements of humanitarian relief personnel be limited or their movements temporarily restricted. This must not be prolonged beyond what is necessary, and for any prolongation of restrictions, sound reasons must be given.³⁰

In certain cases, for instance in certain Security Council resolutions, the term ‘unhindered’ is used. This term should be understood as synonymous with ‘unimpeded’.

‘Passage’

‘Passage’ as used in the GCs and API refers to the transit of relief through the territory of parties to the conflict as well as through the territory of states not party thereto to reach its intended destination.³¹ During IAC, subject to certain conditions, States must allow free passage of certain consignments intended only for civilians and particularly vulnerable groups of another State, even if it is an adversary.³²

In contemporary usage, the meaning of ‘passage’ has generally been broadened to include any movement of relief consignments, equipment and personnel accompanying it or carrying out other humanitarian services, including within the territory of a party to an international or non-international armed conflict. Frequently ‘passage’ and ‘access’ are used interchangeably, as both

²⁷ Art. 70(4) of API; Commentary Art. 18 of APII § 4884.

²⁸ Art. 70(3)(c) of API; Art. 23 of GC IV; Commentary to Art. 18 of APII, § 4888.

²⁹ Customary IHL Rule 56.

³⁰ Art. 71(3) of API; Customary IHL rule 56; Commentary to Art. 71 of API, § 2896.

³¹ See Arts. 23, 59(3) and (4) of GCIV, Art. 70(2) and (3) of API.

³² Art. 23 of GCIV.

must necessarily be granted in order to reach persons in need.³³ In short, it includes all movements required for the effective undertaking of the humanitarian activities. The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted.³⁴

‘Relief’

Relief refers to all activities, services, and delivery of goods, primarily in the field of health, water, habitat and economic security and which seeks to ensure that persons caught up in armed conflict can survive and live in dignity. The humanitarian relief covered by the obligation to facilitate rapid and unimpeded passage must be impartial in character and conducted without any adverse distinction.³⁵

Humanitarian relief includes objects necessary for religious worship and supplies essential to the survival of the civilian population, such as food, water and medical supplies, as well as clothing, bedding, and means of shelter.³⁶ Furthermore, ‘relief’ must be interpreted to include both relief items/goods and humanitarian services/activities.³⁷

Relief personnel may form part of the assistance provided in any relief action,³⁸ for example, for needs assessment, the administration of relief, transportation, distribution, organization/coordination, specialised medical activities and protection services.³⁹

‘Right of control’

As such the “right of control” is not an IHL treaty based expression but is reflected in several IHL provisions.⁴⁰

The fact that parties to the armed conflict and the States which are not party to the armed conflict concerned are under the obligation to allow and facilitate relief schemes remains without prejudice

³³ See Customary IHL rule 55 and ICRC Study on customary IHL, pp. 194-196 and 198-199; Swiss Handbook, pp. 18, 20-22 and 30-31; African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2009 (Kampala Convention), Arts. 5(7) and 7(5)(g).

³⁴ Customary IHL rule 56. See also Amended Protocol II to the CCW, Art.12.

³⁵ Art. 70 of API, Art. 18(2) of APII; see also Commentary to Art. 18 of APII § 4889 describing the guarantees humanitarian organizations must provide.

³⁶ Art. 69 of API; Article 18 of APII; Commentary to Customary IHL rule 54. See also Art. 54(2) of API and Customary rule 54.

³⁷ See e.g. Art. 18(1) of APII: “traditional functions [of Red cross and Red Crescent organizations] in relation to the victims of the armed conflict”. See also Commentary to Art. 18 of APII § 4869, which refers to “humanitarian activities”.

³⁸ Art. 71(1) of API. See also Commentary to Art. 18 APII § 4869: “Article 18 aimed at permitting and facilitating humanitarian *activities* in non-international armed conflicts for the purpose of assisting victims wherever they are and assuring them the *protection* to which they are entitled.”

³⁹ Commentary to Art. 71 of API, § 2879.

⁴⁰ See Art. 23 of the GCIV and Art. 70 § 3 of API.

to their entitlement to control the humanitarian relief schemes⁴¹ through measures such as verifying the humanitarian and impartial nature of the assistance, prescribing technical arrangements for the practical delivery of the assistance as well as restricting the relief activities if reasons of imperative military necessity exist. The argument of military necessity can only be used in order to *temporarily* and *geographically* regulate relief operations. It should not result in a *de facto* prohibition to carry out humanitarian activities once the offer of services has been accepted by the parties to the armed conflict.

Under IHL, the obligation to allow and facilitate - to which the right of control is a corollary - is an obligation of result, not an obligation of means. Thus, even if the holders of the obligation to allow and facilitate are entitled to a related right of control, the implementation of the latter may never result in unduly delaying or rendering impossible the delivery of the humanitarian relief.

Those responsible for the distribution of relief should be trusted to determine the special priorities, such as relief for children, maternity cases, disabled, wounded and sick, or detainees.⁴²

The parties' control should respect, and still enable, the organisation to work according to its own mandate and principles as well as their working modalities. For example there must be no diversion of the relief which would lead to it being distributed with adverse distinction and not according to need.⁴³ Relief personnel, on their side, must not exceed the terms of their humanitarian mission, for example by transmitting information of a military nature they may become aware of (e.g. location of troops).⁴⁴

“Humanitarian relief personnel, and objects used for humanitarian relief operations, must be respected and protected”:

Humanitarian personnel and the objects used for humanitarian relief operations must be respected and protected at all times.⁴⁵ This means first and foremost that they must not be attacked.⁴⁶ The parties must also do their utmost to prevent relief from being diverted or looted,⁴⁷ and to ensure the safety of convoys.⁴⁸ This protection allows humanitarian personnel to act effectively for the benefit of persons in need.⁴⁹ To this end, the parties should provide clear and strict instructions to their armed forces to protect humanitarian relief and personnel, including dissemination about the respect for Red Cross and Red Crescent emblems.⁵⁰

However, this obligation incumbent upon the parties to an armed conflict should not be manipulated so that the activities of an impartial humanitarian organization whose activities were initially consented-to would be wholly rendered impossible. While humanitarian personnel require a minimum of security in order to have access to victims of conflicts and to carry out their activities,

⁴¹ Customary IHL Rule 55. See also e.g. Commentary to Art. 70 API, § 2830 and Commentary to Art. 18 APII § 4887.

⁴² Art. 70(1) of AP I; Commentary to Art. 70 of API, §§ 2817, 2821; Commentary to Art. 18 of APII, § 4889.

⁴³ See Commentary to Art. 70 of API, § 2799ff and Commentary to Art. 18 of APII § 4889.

⁴⁴ Art. 71(4) of AP I; Commentary to Art. 71 of API §§2898, 2901; Commentary to Art. 18 of APII, § 4889.

⁴⁵ Art. 71(2) of API; Customary IHL rules 31 and 32.

⁴⁶ Commentary to Art. 71 of API, § 2885; commentary to customary rules 31 and 32.

⁴⁷ Commentary to Art. 70 of API § 2858, commentary to customary rules 32.

⁴⁸ Commentary to Art. 18 of APII, § 4888.

⁴⁹ Customary IHL rule 56; Commentary to Art. 71 of API § 2871.

⁵⁰ Customary IHL rule 30; Commentary to Art. 70 of API § 2863.

humanitarian organisations do not expect full security guarantees as this would be unrealistic. Humanitarian personnel, by the nature of their functions, are prepared to take a reasonable amount of risk in an insecure environment, but in no circumstances can it be tolerated that humanitarian personnel, objects and vehicles are the objects of threats or attacks.

Relief personnel, for their part, must take account of the national legislation and the security requirements of the Party in whose territory they are carrying out their duties (e.g. route, curfews) and the agreements negotiated with the parties.⁵¹ As explained above, their movement and activities may be temporarily restricted only in the case of imperative military necessity.⁵²

The obligation to respect and protect humanitarian relief personnel and objects is often translated in the phrase “safe access” (which is not itself an IHL terms of art) which is frequently used in UN resolutions or other reference texts concerning humanitarian access.

⁵¹ Art. 71(4) API. Commentary to Art. 71 API § 2902; Commentary to Art. 18 APII § § 4887, 4889 b).

⁵² Customary IHL rule 56.

Annex – Selected Provisions of IHL

International Armed Conflicts

Art. 9/9/9/10 GCs – Activities of the International Committee of the Red Cross

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, [and shipwrecked persons/prisoners of war/civilian persons] and for their relief.

ARTICLE 23 GC IV – Consignment of medical supplies, food and clothing

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

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

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

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

Art. 70 AP I -- Relief actions

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.

3. The Parties to the conflict and each High Contracting Party which allow the passage of relief consignments, equipment and personnel in accordance with paragraph 2:

- (a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;

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(b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;

(c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.

5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1.

Article 71 AP I -- Personnel participating in relief actions

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.

2. Such personnel shall be respected and protected.

3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

Article 81 AP I -- Activities of the Red Cross and other humanitarian organizations

1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned.

2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.

3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.

4. The High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to

those mentioned in paragraphs 2 and 3 available to the other humanitarian organizations referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.

Rules Specific to Situations of Occupation

Article 55 GC IV - Food and medical supplies for the population

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.

Article 59 GC IV- Collective Relief

If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.

Article 69 AP I -- Basic needs in occupied territories

1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the

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survival of the civilian population of the occupied territory and objects necessary for religious worship.

2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59 , 60, 61, 62, 108, 109, 110 and 111 of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay.

Non-International Armed Conflicts

Common Article 3 GCs – Conflicts not of an international nature

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

Article 18 AP II -- Relief societies and relief actions

1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.

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

Customary Law applicable in IAC and NIAC

Humanitarian relief personnel must be respected and protected. (Rule 31)

Objects used for humanitarian relief operations must be respected and protected. (Rule 32)

The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to the right of control. (Rule 55)

The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted. (Rule 56)