

OPINION NOTE

Consent to humanitarian access: An obligation triggered by territorial control, not States' rights

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The debate about the legality of cross-border relief operations has been revived in the wake of the failures experienced by international humanitarian organizations in their response to humanitarian needs in Syria.¹

Beyond the unthinkable suffering experienced by Syria's people, these failures are especially hard to justify given that international humanitarian law (IHL) has developed steadily over the last fifty years, and that notions of

humanitarian access and the right to assistance and protection for victims of disasters and conflicts now seemingly represent an international consensus. This consensus is exemplified within the United Nations (UN) by the activities of the Office for the Coordination of Humanitarian Affairs (OCHA),² the UN Security Council (UNSC)'s policy and practices regarding the right to access humanitarian relief operations,³ and the "Responsibility to Protect" victims of conflict with international armed forces, if necessary.

However, there are ambiguities and weaknesses in this apparent consensus, which are underlined in Emanuela-Chiara Gillard's legal analysis of cross-border operations.⁴ Unsurprisingly, questions of consent and State sovereignty constitute the main stumbling block in connecting humanitarian relief activities with broader actions relating to managing conflicts and international security.

The invocation of IHL at the backdrop of general (traditionally State-centric) international law and its integration in State and UN-led humanitarian interventions must be done in a way that recognizes and preserves the specificities of certain IHL notions. Indeed, since its inception, IHL has recognized and accommodated the roles and responsibilities of *both* State and non-State actors, in their humanitarian and belligerent activities. The ICRC and other impartial humanitarian organizations are entrusted with a crucial assistance and protection mandate under IHL, including the right of initiative provided in Article 3 common to the four Geneva conventions, applicable in non-international armed conflicts. By referring separately to the High Contracting Parties and to the "parties to the conflict", IHL acknowledges the possible non-State nature of some parties to the conflict. These specificities tend to place less relative emphasis on the notion of State sovereignty and more emphasis on the concept of "effective territorial control" and of the responsibility of the parties to the conflict, on the mandatory nature of the medical mission and certain relief operations, and on guarantees concerning the strictly humanitarian nature of assistance.

- 1 See, for instance, Pierre Kraehenbuhl, "There Are No 'Good' or 'Bad' Civilians in Syria – We Must Help All Who Need Aid", *The Guardian*, 3 March 2013, available at: www.theguardian.com/commentisfree/2013/mar/03/red-cross-aid-inside-syria; Rony Brauman, "Médecins Sans Frontières and the ICRC: Matters of Principle", *International Review of the Red Cross*, Vol. 94, No. 888, pp. 1523–1535; Emanuela-Chiara Gillard, "The Law Regulating Cross-Border Relief Operations", *International Review of the Red Cross*, Vol. 95, No. 890, pp. 351–382.
- 2 See for instance OCHA, "Thematic Areas: Humanitarian Access", available at: www.unocha.org/what-we-do/policy/thematic-areas/humanitarian-access.
- 3 See most recently, for instance, the UNSC resolution on humanitarian access in Syria, UN Doc. S/RES/2139, 22 February 2014, in particular paras 4–12.
- 4 E.-C. Gillard, above note 1.

The question of consent

Certain IHL provisions relating to relief operations are written in imperative terms.⁵ Though IHL refers to the notions of “consent”⁶ and “agreement”⁷ in the context of relief operations, the requirement of consent must weigh not on the *principle* of providing assistance but only on the *modalities* of its provision. On this topic, Emmanuela-Chiara Gillard’s article is instructive: the arbitrary refusal to allow relief operations constitutes a violation of IHL.⁸

However, this conclusion too quickly skirts questions regarding the validity of consent from non-State parties to a conflict, as well as the “legality” of “unauthorized” operations mounted by non-governmental organizations (NGOs). Indeed, NGO relief activities are always provided with the *de facto* consent of the State or non-State party to the conflict in control of the territory concerned. This *de facto* consent obviously carries some legal weight, even when it is obtained from a non-State party to the conflict. It implies, *inter alia*, the obligation to respect humanitarian principles and personnel, and the prohibition on depriving people of goods and services essential to their survival. From a legal perspective, therefore, an agreement between an NGO and a non-State party to a conflict pursuant to which the NGO will provide impartial humanitarian assistance should not be considered as an act of direct participation in the hostilities, a hostile act or a crime under international law.

As for propositions intended to overcome the arbitrary refusal by a State party, they mainly rely on imposing sanctions to force the consent and the access. Such argumentation circumvents the prohibition of interference and intervention contained in IHL,⁹ and risks feeding the notion that relief operations can only occur in the shadow of international military interventions.

Between the notions of “sovereign State” and “party to the conflict”: The stakes surrounding consent

There is a substantial difference between humanitarian principles adopted in the framework of the UN and those contained in IHL. Indeed, the Guiding Principles of UN humanitarian assistance were adopted in 1991 to regulate humanitarian

5 Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 3 and 23; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Art. 70.1; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1987) (AP II), Art. 18(2).

6 See common Arts 9/9/9/10 of the GCs for international armed conflicts; GC IV, Art. 59 for occupation; AP II, Art. 18 for non-international armed conflicts.

7 See AP I, Art. 70(1) for international armed conflicts.

8 E.-C. Gillard, above note 1, in particular pp. 356–363.

9 AP I, Art. 70(1).

relief operations in situations of natural disasters and other emergencies.¹⁰ They do not mention armed conflicts and do not use the notion of “parties to the conflict” used in IHL. On the contrary, they stress that the sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the UN Charter, and that humanitarian assistance should be provided with consent and, in principle, on the basis of an appeal made by the affected country. Even if the Guiding Principles do recognize that relief operations must be provided in accordance with the principles of humanity, neutrality, impartiality and independence,¹¹ when it comes to the issue of consent, they recreate a constraint that IHL had previously limited. This constraint – requiring the State’s consent – weighs more heavily on relief operations led by States or international organizations than on those led by private humanitarian organizations. Indeed, respect for sovereignty is a core principle of international law that is binding on States in their interactions with other States.

In contrast, IHL limits the national sovereignty principle, especially in non-international armed conflicts where one State is opposed to one or more non-State armed groups, or multiple non-State armed groups are fighting each other. Thus, IHL privileges the notion of “parties to the conflict” over the notion of State/High Contracting Party. Common Article 3 uses the expression “parties to the conflict”, imposing the same respect for fundamental humanitarian guarantees on both States and non-State armed groups. It also creates a right of humanitarian initiative for the International Committee of the Red Cross (ICRC) and any other impartial humanitarian bodies. It affirms that aid efforts and special agreements signed in non-international armed conflicts to facilitate the application of IHL will not affect the legal status of the parties to the conflict. Lastly, IHL affirms that humanitarian operations should not be regarded as interference in the armed conflict or as a hostile or unfriendly act.¹²

Accordingly, the various references to consent listed above refer to “parties to the conflict”. The rationale is not to defend State sovereignty and territorial integrity but to bind *all* authorities (legitimate or *de facto*) using armed force or exerting control over territory and to remind them of their obligations. There is only one instance in which IHL refers to the consent of the State concerned, rather than to the consent of the parties to the conflict: Article 18(2) of Additional Protocol II (AP II), relative to relief operations in non-international armed conflicts. Opinions on the legal meaning of that specific provision were not unanimous during the negotiation of AP II, as some States showed more concern with preserving their national sovereignty than undertaking to facilitate relief action in all circumstances. However, logic should dictate that it is not possible to apply such an exceptional provision broadly and that States which did

10 UNGA Res. 182 (XLVI), Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, UN Doc. A/RES/46/182, 19 December 1991.

11 UN Doc. A/RES/58/114 (LVIII), Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, 17 December 2003.

12 AP I, Art. 70(1).

not ratify AP II cannot claim the benefit of that provision.¹³ That same logic would hold that this prerogative was given to the State party to the conflict so that it could exercise consent over the territory under its control, and not so that it could forbid relief to (or impose relief and relief organizations affiliated with itself on) territory and populations over which it no longer maintains effective control.¹⁴

In non-international armed conflicts, the notions of “parties to the conflict” and “effective control” are crucial keys to reading and interpreting IHL. Provisions of common Article 3 regarding special humanitarian agreements and the right of humanitarian initiative tend to validate both the ability of the non-State party to consent to relief operations, and the agreements made by and with them. IHL thus attempts to create a duty to facilitate and consent to the relief on the parties that are actually in control of the territory at issue and are therefore able to commit to providing or permitting humanitarian operations in the field. These central provisions governing non-international armed conflict should prevail when trying to interpret and apply apparently more restrictive provisions concerning the State’s consent.¹⁵ The obligation to consent lies obviously on the party that is effectively in territorial control.

Rules 55 and 56 of customary international humanitarian law concerning the authorization of humanitarian operations¹⁶ confirm that the general practice supports the link between the consent ability and the effective territorial control of each party and limits the consent to the right of control of the humanitarian nature of the relief. This link between consent and territorial control is also supported by the recent evolution in the terminology used in the UNSC’s resolutions on the protection of civilians in conflicts, as well as in its resolutions on the situations in Syria and the Central African Republic. In them, the UNSC addresses “all Parties to the conflict”¹⁷ and demands that the “Parties” abide by their obligations to respect and facilitate relief operations, thus including the responsibilities and obligations of the non-State parties to the conflict.¹⁸ It is hard to contemplate how non-State parties to the conflict can have obligations to

13 Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, pp. 1475–1481.

14 In armed conflicts as polarized as the Syrian one, the parties to the conflict may be reluctant, for political reasons, to have humanitarian organizations maintain relations with the enemy. However, it is an abuse of the law for the State to impose a monopoly on humanitarian relief, allowing only organizations affiliated with itself (such as the National Red Cross/Red Crescent Society) to provide aid. According to both IHL and the rules of the International Red Cross and Red Crescent Movement, only the ICRC can act as a neutral humanitarian intermediary in situations of armed conflict.

15 Article 1 of AP II completes common Article 3 without modifying its scope of application. It is therefore logical to assume that the more restrictive provisions of Article 18(2) do not cast doubt on the validity of assistance offers and special agreements concluded in accordance with common Article 3 between relief organizations and non-State parties.

16 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), pp. 193–202.

17 UNSC Res. 2127, 5 December 2013.

18 UNSC Res. 2139, 22 February 2014; UNSC Res. 2127, 5 December 2013; Statement by the President of the Security Council, UN Doc. S/PRST/2013/15, 2 October 2013.

facilitate relief operations and to respect populations without also having their legal capacity to consent to such operations recognized.¹⁹

It would be pertinent to limit the legal obstacles to providing relief born of the inter-State character of the humanitarian organizations within the UN family. This should include, in particular, the possibility of signing special agreements with non-State parties to the conflict, such as non-State armed groups, which is a necessary prerequisite in terms of relief operations and which is already granted by IHL to impartial humanitarian bodies. Provisions of common Article 3 providing that such special humanitarian agreements shall not affect the legal status of the parties to the conflict could enable this evolution and provide an appropriate framework within which to protect humanitarian actors from the criminalization of aid delivered to victims of conflict living in areas under the effective territorial control of armed groups placed on “terrorist” lists.

The medical mission: Beyond consent and borders

Among the diverse forms of humanitarian action, IHL regulates the medical mission around a permanent imperative: to collect and treat all sick and wounded without discrimination other than that based on medical criteria.

This is historically the first and primary relief activity regulated by IHL.²⁰ Subsequent legal developments have extended that protection to all types of conflicts, and to all wounded and sick. They have also widened the scope of IHL to protect other categories of victims of conflict and other types of relief activities.

The “obligation of results” contained in common Article 3 is found in a series of IHL rules protecting the entire operational chain of medical relief: special status for the wounded and sick and for medical staff and facilities; equipment and safe modes of transportation; and a specific protective emblem.²¹

IHL protects the legal autonomy of the medical mission within the mandatory rules of medical ethics pertaining to that profession. As such, the medical mission is not subject to the criteria, formalities and conditions regarding consent that other relief activities are subject to, including those relating to access and control over relief organizations, nature of relief and beneficiaries.

Therefore, and in accordance with medical ethics, any shackles imposed by a State or a non-State party to the conflict on medical activities, whether cross-

19 On this, see UNSC Res. 1674, 28 April 2006, para. 5, on the protection of civilian victims of conflict, which clearly establishes the responsibilities of parties to take any required measures to ensure the population’s safety, condemns the intentional denial of humanitarian assistance and demands that all parties put an end to such practices.

20 It is to allow for the rescue and care of injured, and retrieval of those killed, from the battlefield that Henri Dunant participated in the creation of the Comité International de Secours aux Blessés and supported the drafting of the first Geneva Convention in 1864.

21 This specific protection can be found in GC IV, Arts 3, 16, 18, 19, 20, 21, 22 and 23. In both Additional Protocols, this protection was improved and extended to non-international armed conflicts. It can be found in AP I, Arts 8–31, and in AP II, Arts 7–12. In customary humanitarian law, Rules 25, 26, 28, 29, 30 and 110 listed in the ICRC Customary Law Study, above note 16, are relevant.

border or otherwise, should invariably be considered as arbitrary from the point of view of IHL.

This special legal protection is commensurate with the constant threats and attacks affecting medical missions due to the strategic value assigned to them by some belligerents.²² Destroying or controlling medical facilities and therefore access to medical care is often used and abused to impose terror on the population and deter opposition groups from participating in hostilities. Moreover, the outrageous and illegal nature of such direct attacks should not distract us from equally lethal indirect attacks, especially the abusive use of some domestic legal provisions converting medical relief into a weapon of war to the advantage of the State party to the conflict.

This is particularly important in non-international armed conflicts because of the legal asymmetry between the parties to the conflict. In such contexts, there is a clear need to ensure that reference to sovereignty and domestic law does not contradict or eviscerate the fundamental principles of IHL protecting the medical mission. From an operational perspective, some legal questions must now receive clear answers. Can the State use sovereignty arguments to prevent medical care from being provided to people over whom it no longer has effective control? Can the State use the provisions of domestic law to turn (lack of) access to medical care into a weapon of war? As for access, the arbitrary and abusive interpretation of domestic law on medical care should be limited by clear international guidelines.

In non-international armed conflicts, the most common threat to medical care to the wounded and sick comes from a “police reporting” standard clause present in almost every domestic law. Such clauses require doctors to report certain communicable diseases or specific patients (such as people with gunshot wounds) to health authorities or the police. In time of peace, such clauses can be justified by legitimate State concerns with regard to public health and safety. In such a scenario, respect for medical confidentiality is generally taken into consideration when balancing the benefits of such a practice. However, in armed conflict, the validity and interplay of such domestic clauses with IHL is almost never addressed by IHL experts, either in theory or by challenging the practices of national authorities. Indeed, asking for patients’ names, entering hospitals to interrogate or arrest patients, forcing the wounded to be treated in military facilities,²³ or criminalizing medical activity under the guise of a “fight against terrorism” or the maintenance of law and order should be objected to in a coherent, consistent and systematic manner.

The fact that humanitarian NGOs do not benefit from immunity from domestic law creates risks that should be clarified from an IHL perspective; IHL should limit the application of such controversial provisions, especially with regard to the medical mission and the criminalization of certain medical activities

22 The Review dedicated a special issue to this problem. See *International Review of the Red Cross*, Vol. 95, No. 890, *Violence against Health Care (I): The Problem and the Law*.

23 Amnesty International, *Health Crisis: Syrian Government Targets the Wounded and Health Workers*, 25 October 2011, p. 21, available at: www.amnesty.org/en/library/info/MDE24/059/2011.

that are considered to “support terrorism”. This is particularly important in non-international armed conflicts due to the legal asymmetry created in favour of the State party to the conflict and has been pushed to its height in the current Syrian conflict.²⁴

However, the two Additional Protocols to the Geneva Conventions give a clear answer to these questions. Articles 16 and 10 of Additional Protocol I (AP I) and Article 10 of AP II establish the principle of administrative, security and legal immunity for medical staff, whatever the circumstances and whoever the beneficiary. The only corollary is the requirement for staff to fully comply with the rules of medical ethics.²⁵

In light of domestic legal provisions that require reporting despite otherwise applicable medical confidentiality obligations, AP I²⁶ explicitly forbids medical staff from releasing information on the wounded and sick to the opposing side, regardless of any provisions in domestic law. It also forbids the transmission of data to the party to which the sick or wounded person belongs if the health-care personnel have reason to fear that such information could harm patients or their families.

The residual reference to domestic law left in Article 16(3) does not suffice to change the prohibition into a self-executing obligation. It remains an exception to a prohibition leading, even within domestic law, to a case-by-case judgment balancing the necessity to protect legal principles such as medical confidentiality against procedures purportedly designed to protect law and order. The decision is primarily taken by the medical practitioner in line with the overarching binding principles of medical ethics and the best interests of the patient. In case of disagreement, the final judgment is left to a judge and not to administrative authorities.

Ultimately, Article 16 of AP I confirms this dual obligations mechanism by spelling out only one exception to medical confidentiality under humanitarian law, in cases concerning the notification of communicable diseases.²⁷ Such notification to the health authorities for the sake of public health arguably does not infringe on the patient’s right to medical confidentiality since it can be provided on a “no names” basis.

By doing so, Article 16 recognizes that reporting patients with gunshot wounds is no longer a legal obligation in a period of conflict, but rather falls within the judgement of the doctor, who is duty-bound to prioritize his/her ethical obligation to “do no harm”. This position has been established by the jurisprudence of various countries under their domestic law, which recognizes and arbitrates the duality of obligations relating to medical confidentiality, even

24 Sophie Delaunay, *Condemned to Resist: Professionals in Humanitarian Assistance and Protection*, 10 February, 2014, available at: <http://phap.org/articles/condemned-to-resist>; Amnesty International, *Squeezing the Life out of Yarmouk: War Crimes against Besieged Civilians*, 10 March 2014, available at: www.amnesty.org/en/library/info/MDE24/008/2014/en.

25 AP I, Arts 16(1) and 16(2); AP II, Arts 10(1), 10(2) and 104.

26 AP I, Art. 16(3).

27 AP I, Art. 16(3).

during peacetime.²⁸ It also corresponds with the rules of the Istanbul Protocol regarding doctors' obligations when faced with instances of torture, which clearly state that medical ethics must prevail over other conflicting legal obligations.²⁹

In non-international conflicts, the wording of AP II Article 10 differs slightly but retains the same objective. It is thus erroneous to read this article as "forcing" medical staff to notify the authorities of wounded patients and to blindly obey domestic law.³⁰

National sovereignty and IHL interpretation: The new role of the UN Security Council

Cross-border relief activities have always been an alternative to the arbitrary denial of State consent to relief activities. Historically, only private humanitarian NGOs have carried out relief activities which were "unauthorized" by the State.³¹ The specific legal framework of the medical mission justifies the legal freedom claimed by organizations like Médecins Sans Frontières (MSF), compared to others like the ICRC, which have been given a legal mandate by IHL that includes more constrained relief activities in terms of consent from parties to the conflict.³²

Whatever the state of the legal debate regarding access for humanitarian relief or for the medical mission, the main obstacle to the implementation of IHL goes well beyond the arbitrary nature of withholding consent for relief operations. Indeed, interpretation of IHL applicable to a given armed conflict cannot be left to the sole decision of a State party to that conflict, without jeopardizing the application of IHL principles to the conflict.

The use of international military forces was developed in the early 1990s to impose humanitarian aid and override consent by the concerned parties.³³ But beyond the fact that this solution is not always available due to the lack of

28 In most domestic legal systems, obligations of notification are set out in a way that allows for the conflicting duty to abide by medical ethics to be taken into account. In such a system, sanctions are not automatic but are pronounced by a judge who evaluates the balance that has to be struck between the two competing duties in the case at hand.

29 UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, UN Doc. HR/P/PT/8/Rev.1, 2004, Arts 48–73.

30 The text stresses the primacy of medical ethics and forbids that medical personnel who comply with these rules of conduct be punished. It then states that confidentiality when dealing with the sick and wounded must be respected by all. The text mentions that exceptions to these rules must be spelled out in domestic law. It therefore relies on the guarantees given by the law regarding dual obligations and at the same time protects medical personnel from requests issued by executive civil or military powers in times of armed conflict.

31 Consent or refusal does not need to be explicit. Authorities may prefer to tolerate relief operations rather than explicitly authorize them. Similarly, refusals are seldom explicit. Nevertheless, delays in responding or certain conditions imposed by the authorities require relief organizations to find other channels to respond to the urgency of some situations.

32 On this, see R. Brauman, above note 1.

33 On several occasions, the UNSC decided on international military interventions with the goal of facilitating and securing the delivery of humanitarian aid and, more recently, the protection of populations. International sanctions for war crimes, crimes against humanity and genocide, as well as

consensus within the UNSC, and not always effective in terms of improving the safety of the population, it also runs counter to the prohibition of intervention and interference contained in IHL and the non-violent and neutral character of relief operations.³⁴

The UNSC's stalemate on the use of force in the Syrian case prompted it to explore other ways to strengthen the right to assistance and to humanitarian access. In passing its resolutions on the Syrian crisis, the UNSC has developed a coherent doctrine on the interpretation of IHL, making clear that the right to assistance and to humanitarian access is no longer the monopoly of the State party to the conflict.³⁵ This counters certain abusive sovereignty-based interpretations of IHL that have led to arbitrary denial of assistance and to the use of aid as a weapon of war.

Thus, the UNSC has recognized the concept of arbitrary denial of humanitarian access, and pointed out that such arbitrary denial can constitute a violation of IHL.³⁶ It has further asserted that the obligation to consent weighs on *both* parties, including the non-State party. As a consequence, consent does not lie solely with the State in the case of non-international armed conflicts, nor is it a right that the State can abuse in order to weaken the opposing party or punish the population.³⁷

The UNSC has also established that the medical profession must be neutral, that all medical facilities must be demilitarized, and that medical staff, material and transportation must be granted freedom of movement. It has thus clearly prioritized the rules of IHL regarding the neutrality and independence of medical missions over the rules in domestic law that could transform doctors and medical facilities into proxies for the authorities.³⁸

Finally, the UNSC was led to revive a lapsed provision of IHL, by deciding to open four border posts for relief operations without the consent of the Syrian State in order to avoid a deadlock caused by the UNSC's inability to reach a consensus on the use of coercion.³⁹ The creation of a monitoring mechanism for relief convoys under the responsibility of the UN Secretary General mirrors IHL's requirement that relief operations in the context of international armed conflicts be entrusted to a neutral body, the "Protecting Powers" (or delegated to the

referrals to *ad hoc* tribunals or the International Criminal Court, have also been imposed by the UNSC without the consent of the States concerned.

34 In non-international armed conflicts specifically, AP II, Art. 3 clearly stipulates that "nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs". The UNSC can define a situation as a "threat to international peace and security" and decide upon an international intervention on those grounds. It would be, however, incorrect to base such an intervention on a violation of the rules provided by IHL. Arbitrary denial constitutes a violation of AP II, Art. 18(2), but cannot override the prohibition of intervention stipulated in AP II, Art. 3.

35 In UNSC Res. 2165, 14 July 2014, the UNSC rejected the reference to Chapter 7 and the option to use force in the case of a violation of its decisions, but it said that the resolution – and therefore its interpretation of IHL – has a legally binding effect under Article 25 of the UN Charter.

36 UNSC Res. 2139, 22 February 2014.

37 UNSC Res. 2127, 5 December 2013; UNSC Res. 2139, 22 February 2014; UNSC Res. 2165, 14 July 2014.

38 UNSC Res. 2139, 22 February 2014.

39 UNSC Res. 2165, 14 July 2014.

ICRC as a “substitute for the Protecting Powers” in the event that the parties to the conflict fail to come to an agreement about the Protecting Powers). This mechanism effectively removes from the parties to the conflict their prerogative to inspect and control relief – and consequently, their right to consent and their capacity to limit such relief.

The Syrian armed conflict being of a non-international character, the ICRC was not in a position to legally impose such a mechanism and remained constrained by the requirement that it fulfil its full humanitarian mandate only with the Syrian government's consent.

At the same time, MSF decided that due to the medical nature of its activities, those activities could legally be carried out without governmental consent in areas outside of the Syrian government's territorial control, where MSF's principled humanitarian activities were consented to by the *de facto* authorities in territorial control of those areas. In line with the same legal reasoning, and because of the Syrian government's refusal to consent to MSF's presence and activities, MSF abstained from providing direct relief in areas under the government's territorial control.

By reviving this mechanism and applying it to a non-international armed conflict such as Syria, the UNSC returned to IHL the effectiveness and autonomy it needs when faced with an abusive interpretation of law by the belligerents. It has also, paradoxically, restored the spirit and independence of the law and distanced it from the logic of sovereignty or recourse to international force. This unanimously adopted humanitarian resolution on a conflict, which has rendered manifest a collective political impotence to bring to a halt such unprecedented levels of violence and atrocity, may bring with it the foundation for a new humanitarian consensus within the international community.