

## REPORTS AND DOCUMENTS

# ICRC Q&A and lexicon on humanitarian access<sup>1</sup>

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A considerable number of countries have been the theatre of armed conflicts – whether international or non-international – with all the devastation and suffering that this entails, 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 health care.

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

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 organization – 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 organization, such as the ICRC, cannot be interpreted as

interference in States' internal affairs, nor as recognition of or 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 access by humanitarian personnel to individuals in need. This absence of security may materialize in the 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.

The short Q&A section below is followed by a more detailed lexicon section providing the meaning of key expressions and terms used in the IHL rules on humanitarian access.

## **Q&A on humanitarian access**

### **1. What causes limitations to humanitarian access?**

Constraints or limitations imposed on humanitarian access may have different causes. First, security-related concerns are among the main factors limiting humanitarian access. When hostilities are ongoing, 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.

Second, 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 the adversary and/or the civilian population of essential supplies.

1 Editor's note: For the purposes of the *Review*, a few editorial changes have been made to the original text, which is available online at: [www.icrc.org/eng/resources/documents/article/other/humanitarian-access-icrc-q-and-a-lexicon.htm](http://www.icrc.org/eng/resources/documents/article/other/humanitarian-access-icrc-q-and-a-lexicon.htm) (all internet references were accessed in June 2014). On this topic in the *Review*, see also Felix Schwendimann, "The legal framework of humanitarian access in armed conflict", Vol. 93, No. 884, December 2011, pp. 993–1008; Emanuela-Chiara Gillard's "The Law Regulating Cross-Border Relief Operations", Vol. 95, No. 890, Summer 2013, pp. 351–382; Françoise Bouchet-Saulnier, "Consent to Humanitarian Access: An Obligation Triggered by Territorial Control, Not States' rights" in this issue of the journal.

Another important constraint on humanitarian access is a growing perception over recent 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 activities.<sup>2</sup> 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 in convincing parties to an armed conflict of their true intent, which is to provide humanitarian relief to persons in need or to have a protection<sup>3</sup> 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 humanitarian personnel 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, in order to promote trust and support for its activities and to reach agreement with the parties about them.

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

2 For more details on the notion of “humanitarian activities”, see the lexicon below.

3 The ICRC’s definition of “protection” is as follows: “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.” The 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; and search for results and impact. See “ICRC Protection Policy”, *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, available at: [www.icrc.org/eng/resources/documents/article/review/review-871-p751.htm](http://www.icrc.org/eng/resources/documents/article/review/review-871-p751.htm).

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 obligation to assist and protect 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. This means that all States must do everything in their power to put an end to violations of IHL, *inter alia* by exercising their influence over those who violate its provisions.

### 3. What is the 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 various other ways of accessing people in need.

For its part, the ICRC has always considered cross-border operations to be a possibility, as long as they can 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.<sup>4</sup>

Thus, 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 for the ICRC 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 respect of the provisions of IHL in the situations of armed conflict in which it is working throughout the world. In recent years, the ICRC has publicly expressed the need to provide 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.<sup>5</sup>

4 More details on these IHL rules governing humanitarian access can be found at questions 5 and 6 and in the lexicon below.

5 See Council of Delegates, Resolution on Humanitarian Assistance in Situations of Armed Conflict, 1991; Council of Delegates, Resolution on the Principles of Humanitarian Assistance, 1993; International Conference of the Red Cross and Red Crescent, Resolution on Protection of the Civilian Population in Periods of Armed Conflict, 1995; International Conference of the Red Cross and Red Crescent, Plan of Action for the Years 2000–2003, 1999; International Conference of the Red Cross and Red Crescent, Resolution 2, "4-Year Plan of Action", 31C/11/R2, 28 November–1 December 2011; ICRC, "Protection

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?<sup>6</sup>

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.<sup>7</sup>

IHL treaties and customary IHL contain specific rules governing relief and protection in favour of those in need,<sup>8</sup> be they civilians, sick or wounded fighters or any other category of victims of armed conflict.

Although these rules vary slightly depending on the nature of the conflict – occupation, international armed conflict (IAC) other than occupation, or non-international armed conflict (NIAC) – 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.<sup>9</sup> 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

of Civilians: ICRC Statement to the UN Security Council”, 22 August 2013, available at: [www.icrc.org/eng/resources/documents/statement/2013/08-19-civilians-un-security-council.htm](http://www.icrc.org/eng/resources/documents/statement/2013/08-19-civilians-un-security-council.htm).

<sup>6</sup> See also the lexicon and list of relevant IHL provisions below.

<sup>7</sup> Art. 1 common to the four Geneva Conventions.

<sup>8</sup> In international armed conflict other than occupation, the most relevant IHL provisions are: Arts 9/9/9/10 of the four GCs respectively; GC IV, Arts 17 and 23; AP I, Arts 68–71 and 81. In situations of occupation, the most relevant provisions are GC IV, Arts 59 and 61, and AP I, Arts 69 and 71. Lastly, in NIAC the relevant norms are common Art. 3(2) and AP II, Art. 18. See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 55 and 56 applicable in both IAC and NIAC.

<sup>9</sup> In situations 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.

conflict must allow and facilitate rapid and unimpeded passage of these relief schemes, subject to their right of control.

Other relevant IHL provisions are those related to the respect and the protection of humanitarian and medical relief personnel and objects,<sup>10</sup> and to the prohibition to use starvation of the civilian population as a method of warfare.<sup>11</sup>

## 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 organizations 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.<sup>12</sup> However, the decision of the party concerned to consent to relief schemes in its territory is – under IHL – not discretionary.<sup>13</sup>

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 or to deny in their entirety the humanitarian activities proposed by impartial humanitarian organizations.

10 In IAC, the most relevant IHL provisions are AP I, Arts 12, 15, 21 and 70–71. In NIAC, the most relevant IHL provisions are AP II, Arts (1) and 11(1). See also ICRC Customary Law Study, Rules 25 and 28–32.

11 In IAC, the most relevant IHL provision is API, Art. 54(1). In NIAC, the most relevant IHL provision is AP II, Art.14. See also ICRC Customary Law Study, above note 8, Rule 53.

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

13 The IHL rules governing consent vary in their scope and wording. For instance, in occupation, GC IV, Art. 59 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 and terms on humanitarian access

### IHL rules on humanitarian access

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. Under IHL, the parties to the conflict must consent to such activities when the needs of the population under their control are not met.
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 must allow and facilitate rapid and unimpeded passage of these relief schemes, subject to their right of control.
5. 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 cases of imperative military necessity may their movements be temporarily restricted.
6. Humanitarian relief personnel, and objects used for humanitarian relief operations, must be respected and protected.

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

It should be recalled that IHL provides specific rules for humanitarian relief operations both in IAC and NIAC. These rules are not applicable outside the context of armed conflicts.

1. 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 also been expressly transposed to the IHL rules governing occupation for the Occupying Power.<sup>14</sup> IHL provisions governing IAC (other

<sup>14</sup> GC IV, Art. 55; AP I, Art. 69.

than occupation) and NIAC do not specifically contain a similar rule. However, in such situations, the responsibility of the parties to the 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.

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.

With Article 3 common to the four GCs, second paragraph, and Articles 9/9/9/10 of the four GCs respectively, 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 over time recognized that these offers of services made by impartial humanitarian organizations cannot be regarded as unlawful interference in the 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 organizations within the framework set by IHL.

- Impartial humanitarian organizations

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**”. 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.<sup>15</sup>

- Humanitarian activities

International humanitarian law does not specifically define the notion of “**humanitarian activities**” that impartial humanitarian organizations may offer to the parties to an armed conflict. Articles 9/9/9/10 of the four GCs respectively, applicable to IAC, specify that the ICRC or any other impartial humanitarian organization can offer to undertake humanitarian activities for the *protection* and *relief* of those affected by armed conflict. Common Article 3 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 therefore have a protection<sup>16</sup> and relief<sup>17</sup> 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 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.

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

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

16 See above note 3.

17 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 AP I, 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.

- “...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.

### 3. 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 to humanitarian access (i.e. a right of actually being guaranteed to be able to undertake the proposed humanitarian activities). Whether impartial humanitarian organizations 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.<sup>18</sup> However, be it in IAC (including in situations 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.<sup>19</sup>

In IAC (including occupation), the relevant IHL provisions<sup>20</sup> indicate that consent only needs to be obtained from those States which qualify as parties 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 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 territory controlled by the adversary).

In NIAC, common Article 3 is silent on 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

18 For IAC, see Arts 9/9/9/10 of the four GCs respectively, and AP I, Art. 70(1); for occupation, see GC IV, Art. 59; for NIAC, see AP II, Art. 18.

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

20 Arts 9/9/9/10 of the four GCs respectively; AP I, Art. 70(1). For occupation, GC IV, Art. 59.

answered based on a careful consideration of the relationship between this provision and Article 18(2) of AP II, which expressly requires the consent of the High Contracting Party – in other words, the State party to the conflict. On this basis, *as a matter of IHL*, consent is to be sought from the State on 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.<sup>21</sup> 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.

#### 4. 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.

The expression “arbitrary denial/withholding of consent to relief operations” has been sometimes used 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

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

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 refusal by a party to an armed conflict results in starvation of civilians as prohibited by Article 54 of AP I or where the party 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 from taking appropriate measures – in conformity with the applicable rules of 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 States' obligation to ensure respect for IHL, as specified in common Article 1.

5. 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 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 (in other words, the broad decision made by that party according to which an impartial humanitarian organization can be present and operate in its territory or 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 relief is therefore an obligation conditioned by and directly deriving from the consent to the offer of humanitarian services, which the parties to the armed conflict concerned have previously given.

- **Must allow and facilitate**

Once relief actions are accepted in principle, the parties to an armed conflict are under an obligation to cooperate, and to take positive action to facilitate the operations.<sup>22</sup> The parties must facilitate the tasks of relief personnel.<sup>23</sup> This may include simplifying administrative formalities as much as possible to facilitate visas or other immigration issues, financial/taxation issues, import/export, field

22 Commentary to AP II, Art. 18, para. 4888.

23 Commentary to AP I, Art. 71, para. 2892; AP II, Art. 18, paras 4869 and 4888.

trip approvals, and possibly privileges and immunities necessary for the organization's work; in short, "all facilities" needed for the organization to carry out its agreed humanitarian functions appropriately.<sup>24</sup> Measures must be also taken for the overall efficacy of the operations (for instance, 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 section 6, below), and by facilitating their rapid distribution (see the notion of "rapid", explained below).<sup>25</sup> Armed 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 to the conflict may include encouraging and facilitating effective international coordination of relief actions.<sup>26</sup>

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.<sup>27</sup>

Under the law governing IAC, this obligation to allow and facilitate applies not only 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 territory.<sup>28</sup>

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 will not oppose the use of their territory by impartial humanitarian organizations 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 being addressed and thus render the consent given by the parties to the conflict void.

24 See *inter alia* International Conference of the Red Cross and Red Crescent, Resolution 2, "4-Year Plan of Action", 31C/11/R2, 28 November–1 December 2011, Objective 1, "Enhanced Access by Civilian Populations to Humanitarian Assistance in Armed Conflicts", available at: <https://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-2-2011.htm>.

25 AP I, Art. 70(4). See also Commentary to AP II, Art. 18, para. 4888. See the notion of "rapid" explained below.

26 AP I, Art. 70(5).

27 AP I, Arts 81(1), (2) and (3).

28 GC IV, Art. 23; AP I, Art. 70(2); ICRC Customary Law Study, above note 8, Rule 55.

- **Rapid**

Once relief actions are accepted in principle, parties must facilitate their rapid distribution,<sup>29</sup> and not arbitrarily delay the forwarding of relief consignments,<sup>30</sup> 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 is acceptable,<sup>31</sup> and in the exceptional case of imperative military necessity, the movement of humanitarian personnel may be temporarily restricted.<sup>32</sup>

In certain instances – for example, in some United Nations (UN) 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**

The notion of “unimpeded” denotes 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.<sup>33</sup>

Only in case of imperative military necessity may the activities 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.<sup>34</sup>

In certain cases – for instance, in certain UN 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 AP I 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.<sup>35</sup> 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.<sup>36</sup>

29 AP I, Art. 70(4); Commentary to AP II, Art. 18, para. 4884.

30 AP I, Art. 70(3)(c); GC IV, Art. 23; Commentary to AP II, Art. 18, para. 4888.

31 See the notion of the “right of control” explained below.

32 ICRC Customary Law Study, above note 8, Rule 56. See the notion of “unimpeded” passage of relief explained below.

33 See the definition of “respect and protect” in section 6, below.

34 AP I, Art. 71(3); ICRC Customary Law Study, above note 8, Rule 56; Commentary to AP I, Art. 71, para. 2896.

35 See GC IV, Arts 23, 59(3) and (4); AP I, Arts 70(2) and (3).

36 GC IV, Art. 23.

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 IAC or NIAC. Frequently “passage” and “access” are used interchangeably, as both must necessarily be granted in order to reach persons in need.<sup>37</sup> In short, it includes all movements required for the effective undertaking of 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 cases of imperative military necessity may their movements be temporarily restricted.<sup>38</sup>

- Relief

“Relief” refers to all activities, services and delivery of goods, primarily in the field of health, water, habitat and economic security and which seek to ensure that persons caught up in armed conflict can survive and live in dignity. 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.<sup>39</sup> Furthermore, “relief” must be interpreted to include both relief items/goods and humanitarian services/activities.<sup>40</sup>

The humanitarian relief covered by the obligation to facilitate rapid and unimpeded passage must be impartial in character and conducted without any adverse distinction.<sup>41</sup> Relief personnel may form part of the assistance provided in any relief action,<sup>42</sup> for example, for needs assessment, the administration of relief, transportation, distribution, organization/coordination, specialized medical activities and protection services.<sup>43</sup>

37 See ICRC Customary Law Study, above note 8, Rule 55 and pp. 194–196 and 198–199; Swiss Federal Department of Foreign Affairs, *Humanitarian Access in Situations of Armed Conflict: Handbook on the Normative Framework*, Version 1, 2011, pp. 18, 20–22, 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).

38 ICRC Customary Law Study, above note 8, Rule 56. See also Amended Protocol II to the Convention on Certain Conventional Weapons, Art.12.

39 AP I, Art. 69; AP II, Art. 18; Commentary to the ICRC Customary Law Study, above note 8, Rule 54. See also AP I, Art. 54(2); ICRC Customary Law Study, above note 8, Rule 54.

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

41 AP I, Art. 70; AP II, Art. 18(2); see also Commentary to AP II, Art. 18, para. 4889, describing the guarantees that humanitarian organizations must provide.

42 AP I, Art. 71(1). See also Commentary to AP II, Art. 18, para. 4869: “Article 18 is 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.”

43 Commentary to AP I, Art. 71, para. 2879.

- Right of control

The “right of control” is not an IHL treaty-based expression as such, but is reflected in several IHL provisions.<sup>44</sup> The fact that parties to the armed conflict and States which are not party thereto are under the obligation to allow and facilitate relief schemes remains without prejudice to their entitlement to control the humanitarian relief schemes<sup>45</sup> through measures such as verifying the humanitarian and impartial nature of the assistance, prescribing technical arrangements for the practical delivery of the assistance and restricting 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 against carrying 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 special priorities, such as relief for children, maternity cases, the disabled, the wounded and sick, or detainees.<sup>46</sup>

The parties’ control should respect and enable the organization’s ability 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 that would lead to it being distributed with adverse distinction and not according to need.<sup>47</sup> Relief personnel, on their side, must not exceed the terms of their humanitarian mission, for example by transmitting information of a military nature of which they may become aware (such as location of troops).<sup>48</sup>

## 6. 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.<sup>49</sup> This means first and foremost that

44 See GC IV, Art. 23; AP I, Art. 70 (3).

45 ICRC Customary Law Study, above note 8, Rule 55. See also e.g. Commentary to AP I, Art. 70, para. 2830; Commentary to AP II, Art. 18, para. 4887.

46 AP I, Art. 70(1); Commentary to AP I, Art. 70, paras 2817 and 2821; Commentary to AP II, Art. 18, para. 4889.

47 See Commentary to AP I, Art. 70, paras 2799 ff; Commentary to AP II, Art. 18, § 4889.

48 AP I, Art. 71(4); Commentary to AP I, Art. 71, paras 2898, 2901; Commentary to AP II, Art. 18, para. 4889.

49 AP I, Art. 71(2); ICRC Customary Law Study, above note 8, Rules 31 and 32.



they must not be attacked.<sup>50</sup> The parties to the conflict must also do their utmost to prevent relief from being diverted or looted,<sup>51</sup> and to ensure the safety of convoys.<sup>52</sup> This protection allows humanitarian personnel to act effectively for the benefit of persons in need.<sup>53</sup> To this end, the parties should provide clear and strict instructions to their armed forces to protect humanitarian relief and personnel, and respect the Red Cross and Red Crescent emblems.<sup>54</sup>

However, this obligation incumbent upon the parties to an armed conflict should not be manipulated so that the activities of an impartial humanitarian organization – 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, humanitarian organizations 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 humanitarian personnel, objects and vehicles be 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 on whose territory they carry out their duties (for instance, routes and curfews) and the agreements negotiated with the parties.<sup>55</sup> As explained above, their movements and activities may be temporarily restricted only in cases of imperative military necessity.<sup>56</sup>

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

50 Commentary to AP I, Art. 71, para. 2885; Commentary to ICRC Customary Law Study, above note 8, Rules 31 and 32.

51 Commentary to AP I, Art. 70, para. 2858; Commentary to ICRC Customary Law Study, above note 8, Rule 32.

52 Commentary to AP II, Art. 18, para. 4888.

53 ICRC Customary Law Study, above note 8, Rule 56; Commentary to AP I, Art. 71, para. 2871.

54 ICRC Customary Law Study, above note 8, Rule 30; Commentary to AP I, Art. 70, para. 2863.

55 AP I, Art. 71(4); Commentary to AP I, Art. 71, § 2902; Commentary to AP II, Art. 18, paras 4887, 4889(b).

56 ICRC Customary Law Study, above note 8, Rule 56. See above discussion on the term “right of control”.