

Refereed article

Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective

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Introduction

Syria's refusal to allow humanitarian actors to provide assistance to the Syrian population in need, at least on a number of occasions,¹ has again drawn attention to the continued validity of the requirement of state consent with regard to the outside provision of humanitarian assistance. This refusal to give consent has again foregrounded such questions as to whether a state's denial of access is an entirely discretionary decision and whether humanitarian actors can provide assistance without obtaining consent to operate.

At the outset, it is appropriate to bear in mind that there is not one legal regime governing humanitarian relief operations. Different regimes may apply depending on whether relief is given in situations of occupation, international armed conflict, non-international armed conflict or peacetime conflict or disaster. What unites these regimes, however, is their emphasis on state consent: without consent, humanitarian actors cannot provide relief to the stricken population. Admittedly, as will be explained in Section 1 of this article, some inroads have been made into this requirement via human rights law, the prohibition of starving the civilian population, and the prohibition of invoking arbitrary or capricious reasons to deny access. Nevertheless, as argued in Section 2, states can easily circumvent these limitations by subsuming their motivation under a number of *legitimate* reasons for refusal, a problem which is compounded by the absence of international control mechanisms.

Faced with the weaknesses of international law-monitoring and enforcement, humanitarian actors may well decide to override the state's refusal to give consent and to take independent action by setting up clandestine missions in the state instead (*e.g.* hospitals). Section 3 reviews three legal bases justifying such unilateral action, as taken by *non-governmental* humanitarian actors.

Section 4 shifts the attention to consent-related challenges associated with providing humanitarian assistance in territory held by *non-state* armed (insurgent) groups – an essential

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¹ While the Syrian Government has not imposed a blanket ban on the provision of outside aid, it has, on a number of occasions, erected serious obstacles to the international community's relief efforts. In February 2012, it denied Valerie Amos, the head of the UN's Office for the Coordination of Humanitarian Affairs (OCHA), entry into Syria ("UN humanitarian aid chief denied entry into Syria", *Reuters*, 29 February 2012). In March 2012, it refused the allow aid into the besieged city of Homs, citing security concerns ('Syria refuses to allow into Homs', *The Guardian*, 6 March 2012). And in July 2012, it refused visas for aid workers from the United States, Canada, the United Kingdom, and France, on the grounds of their nationality ('Syria refusing visas for Western aid workers', *Reuters*, 16 July 2012). It is estimated that more than two and a half million people in Syria are in need of humanitarian assistance. See USAID, Factsheet # 5, Syria – complex emergency, FY 2013, 12 December 2012.

subject given the current prevalence of non-international armed conflicts. This section examines (1) under what circumstances humanitarian actors' cooperation with such groups compromises their impartiality, and may thus give states legitimate reason to revoke consent; (2) whether humanitarian actors need to secure the consent of their home states or third states when engaging with non-state armed groups listed as terrorist groups; (3) whether insurgent groups have the legal right to refuse to give their consent.

I. The Requirement of State Consent under the Current Humanitarian Law Regime

This section will look into the requirement of state consent and its modalities with respect to offers of outside humanitarian assistance. It tackles four legal regimes: occupation, international armed conflict, non-international armed conflict, and peacetime emergencies.

In situations of occupation, it is not contested that the Occupying Power is under an international obligation to grant access to outside actors providing humanitarian assistance, if, obviously, such assistance is needed and destined for the civilian population. Article 59 of the Fourth Geneva Convention 1949 (GC IV) is rather clear: "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 respective population and shall facilitate them by all the means at its disposal".² Under Article 62 of the Convention, the civilian population of the occupied territory has a related *right* to receive humanitarian assistance.³ These provisions mark a break with the situation before 1949, when belligerents did not have a legal obligation to accept relief consignments intended for the civilian population.⁴

The same strict obligation to allow relief may not apply in respect of situations of international armed conflict that are not covered by the occupation regime. While Article 70(1) of the First Additional Protocol to the Geneva Conventions 1977 (AP I) provides that "[i]f the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with (...) supplies (...), relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken", it subjects this requirement to "the agreement of the Parties concerned in such relief actions". The combination of a failure to identify the addressee of the obligation in the first part of the cited provision, combined with the emphasis on the Parties concerned – logically including the territorial state – may yield the conclusion that states are *not required to give their consent*⁵ in international armed conflicts.

Still, States may not justify their refusal on the ground that they regard the relief offers "as interference in the armed conflict or as unfriendly acts".⁶ The principle that the provision of

² Note that pursuant to Article 59 GC IV "[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."

³ Article 62 GC IV: "Subject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them."

⁴ J. Pictet (ed.), 'Commentary on the Geneva Conventions of 12 August 1949 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea', Geneva: International Committee of the Red Cross 1959.

⁵ R. Barber, 'Facilitating humanitarian assistance in International humanitarian and human rights law', 91 *International Review of the Red Cross* 2009-874, p. 386. ("There is an obvious tension here between the words 'shall be undertaken' and 'subject to the consent of' – that is, the requirement for a humanitarian agency to obtain authorisation from the state concerned and the obligation on the part of the state to grant it.")

⁶ Article 71(1) AP I.

humanitarian assistance cannot be considered as an intervention in the internal affairs of a state was confirmed by the International Court of Justice in the judgment of the *Nicaragua* case, where the Court held: “There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law,”⁷ at least if “it is given ‘without discrimination’ of any kind” and “limited to the purposes hallowed in the practice of the Red Cross, namely ‘to prevent and alleviate human suffering’, and ‘to protect life and health and to ensure respect for the human being’”, and if it is “given without discrimination to all in need”.⁸

This reasoning is compelling, but it provides little authority for the existence of an international duty on the part of the territorial state to consent to humanitarian assistance: the Court in the *Nicaragua* Case limited itself to stating that the provision of outside humanitarian assistance is not a violation of the principle of non-intervention. A duty to consent could perhaps more convincingly be derived from Article 8(b) (xxv) of the ICC Statute, which considers wilfully impeding relief supplies as a war crime in international armed conflicts.⁹ However, this provision too leaves the door ajar for a refusal to consent, as only *wilfully* impeding relief supplies qualifies as a crime.

Ultimately, a combination of these different legal principles may yield the rule that states may indeed *refuse* consent, but *not* for arbitrary or capricious reasons.¹⁰ The acceptable grounds for refusal to give consent and their practical application are further discussed in the next section.

Also with respect to non-international armed conflicts – the sheer majority of the current armed conflicts – international humanitarian law does not provide for an unambiguous obligation to consent to outside humanitarian assistance. To be sure, Article 18.1 of the Second Additional Protocol to the Geneva Conventions 1977 (AP II) establishes a right for “relief societies located in the territory” where the conflict is taking place to offer their services and, in case there are no adequate supplies, Article 18.2 AP II provides that “relief actions (...) shall be undertaken”.¹¹ As such, however, Article 18 AP II does not grant outside actors access to the territory of the State party. Rule 55 of the International Committee of the Red Cross (ICRC) study on customary international humanitarian law indeed clarifies that access remains subject to the consent of the state.¹² Still, the state may arguably not deliberately withhold consent if this would lead to the starvation of the civilian population – which is prohibited as a method of warfare under Article 14 of Additional Protocol II.¹³ And it is again arguable that authorities should not withhold consent for arbitrary or capricious reasons.

⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, [1986] ICJ Rep, at 14, para. 242.

⁸ *Ibid.*, para. 243.

⁹ The definition of this war crime under the provision is as follows: “Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions”.

¹⁰ This is a rule of reasonableness which is not laid down in any treaty, but has been developed by academics and humanitarian professionals, arguably on the basis of the aforementioned legal principles. See also H. Spieker, ‘The Right to Give and Receive Humanitarian Assistance’, in H. J. Heintze and A. Zwitter (eds.), *International Law and Humanitarian Assistance*, Berlin: Springer 2011, pp. 13- 14.

¹¹ Contrast with the clearly non-obligatory language as regards humanitarian assistance used in Common Article 3 of the four Geneva Conventions of 1949: “An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict”.

¹² J. Henckaerts & L. Doswald-Beck, ICRC (eds.), *Customary International Humanitarian Law, Vol I., Rules*, Cambridge University Press & ICRC 2006.

¹³ Unlike in *international* armed conflicts, starving the population as a method of warfare in non-international armed conflicts is not a war crime under Article 8 of the ICC Statute.

Outside situations of armed conflict, including situations of internal strife, disturbances and riots, the requirement of the territorial state's consent as regards the provision of assistance by outside humanitarian actors also applies. The International Law Commission's (ILC) Draft Article 11.1 on the Protection of Persons in the Event of Disasters unambiguously stipulates that "[t]he provision of external assistance requires the consent of the affected State", although it mitigates this requirement somewhat by providing in Article 11.2 that "[c]onsent to external assistance shall not be withheld arbitrarily" and in Article 11.3 that "[w]hen an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known".¹⁴ The requirement of consent in this draft article stems from the 1929 Convention establishing an International Relief Union (which is no longer in force),¹⁵ and Article 25(2) of the Guiding Principles on Internal Displacement.¹⁶ Consent was reaffirmed in the latest Resolution of the General Assembly on the issue (2012),¹⁷ although this Resolution also calls upon states "to cooperate fully with the United Nations and organisations and to ensure the safe and unhindered access of humanitarian personnel".¹⁸

It has to be noted that human rights discourses have penetrated the legal regimes governing humanitarian assistance (including the regimes applicable in situations of armed conflict)¹⁹ and have eroded, or at least conditioned, the state consent requirement. One can argue that denying access to outside humanitarian actors could lead to starvation and thus amount not only to a violation of the humanitarian law prohibition of starvation, but also of the (human) right to life, as enshrined in Article 2 of the International Covenant on Civil and Political Rights.²⁰ From this perspective states could only deny access if such denial will not result in the deaths of individuals deprived of assistance. In any event, whether or not the civilian population's right to life is threatened, states are always under an obligation to cooperate internationally to realise social rights, such as the rights to food and health.²¹ This is admittedly an obligation to only *progressively* realise such rights, but it remains no less true that

¹⁴ ILC, Chapter XI, Protection of Persons in the Event of Disasters, UN Doc. A/66/10 (2011), p. 267 *et seq.*

¹⁵ 1927 Convention establishing an International Relief Union, Geneva (1927).

¹⁶ Article 25(2) of the Guiding Principles (OCHA, 2001) reads in relevant part: "Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance". See for a discussion of the right to humanitarian assistance under these Guiding Principles: D. Fisher, 'The Right to Humanitarian Assistance', in W. Kälin, R.C. Williams, K. Koser, A. Solomon (eds.), *Incorporating the Guiding Principles in on Internal Displacement into Domestic Law: Issues and Challenges*, Studies in Transnational Legal Policy, no. 41, Washington D.C.: Brookings Institution 2010, pp. 45-128.

¹⁷ UN Doc. A/67/L.39 (2012), Strengthening of the coordination of emergency humanitarian assistance of the United Nations ("Emphasising also the fundamentally civilian character of humanitarian assistance, and, in situations in which military capacity and assets are used to support the implementation of humanitarian assistance, reaffirming the need for their use to be undertaken *with the consent of the affected State* and in conformity with international law, including international humanitarian law, as well as humanitarian principles") (emphasis added).

¹⁸ *Ibid.*, para. 37.

¹⁹ Human rights continue to apply in situations of armed conflict. See International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 *I.C.J. Rep.* 136, para. 112.

²⁰ R. Abril Stoffels, 'Legal Regulation of Humanitarian Assistance in Armed Conflicts: Achievements and Gaps', 86 *International Review of the Red Cross* 2004-855, pp. 517-518.

²¹ Article 2(1) of the International Covenant on Economic, Social and Cultural Rights ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures").

states are obliged to at least take steps to accept, or even to actively seek outside humanitarian assistance if they themselves, due to resource constraints, cannot provide sufficient humanitarian assistance to realise the population's rights to food and health.

II. Withholding Consent: Grounds and Problems of Control

The foregoing overview demonstrates that international law still gives pride of place to the requirement of state consent as an attribute of state sovereignty. State consent remains a hallmark of the law of humanitarian relief²² and a major practical limitation to humanitarian relief operations. Nevertheless, sovereignty is no longer conceived as a blank cheque for refusing access to humanitarian actors. Under pressure of discourses of human rights, human security and the responsibility to protect a vulnerable population, sovereignty is no longer viewed as merely conferring rights, but also as entailing obligations for states: consent may be withheld, but only if proper justification is offered. This is translated into the principle that consent may not be withheld for arbitrary or capricious reasons.

To be sure, the exact application of this principle in concrete situations is open to multiple interpretations. Indeed, 'good reasons' may easily be conjured up by states.²³ Dinstein noted in this respect that "as long as consent is essential, those authorities can usually find plausible excuses for delaying humanitarian assistance and even for frustrating it altogether".²⁴ Regrettably, even if consent is given in principle, states may use additional bureaucratic tactics to complicate the delivery of humanitarian aid, e.g. by requiring special internal travel permits or delaying the issuance of visas.²⁵

However that may be, it appears that consent can indeed be lawfully withheld, and offers for assistance can be turned down in a number of situations such as if the state does not need assistance (because its own resources and capacities suffice to provide relief), if those offering assistance are not neutral or impartial (because they are in reality foreign political operators, or because they take sides in the conflict), if relief is diverted by belligerents to fund the war effort, or if security reasons militate against allowing access. Other reasons will quite probably amount to arbitrarily withholding consent in violation of international law.

These exceptions are rather straightforward and deserve support, although their practical application might prove highly contentious. For instance, while reasonableness dictates that a government should be allowed to prohibit shipments of foreign relief supplies if it transpires that these supplies are diverted to armed groups fighting this very government, one may legitimately wonder what proportion of these supplies need to be diverted for the government to successfully rely on the exception to deny access: does a diversion of 10 pct. of the (value of the) goods suffice, or should a 50 pct. or an even higher threshold be maintained? These are difficult questions for governments, for which no clear answers are available. They will have to weigh their right to militarily defend themselves and their humanitarian obligations *vis-à-vis* their population. The only useful, and at the same time trivial rule of thumb is that they should be allowed to prohibit shipments of humanitarian goods if such shipments provide a definite military advantage to their opponents and the

²² Y. Dinstein, 'The Right to Humanitarian Assistance', working paper for the International Humanitarian Law Research Initiative, Program on Humanitarian Policy and Conflict Research, Harvard University 2000, reprinted in *Naval War College Review* 2000, ad fn. 37, also citing M. Torrelli, 'From Humanitarian Assistance to 'Intervention on Humanitarian Grounds,' 32 *International Review of the Red Cross* 1992-288, p.232.

²³ If a state (actor) can advance a good reason to refuse consent, impeding relief supplies may no longer be considered as a violation of international humanitarian law nor of the ICC Statute, which requires that the impediments to relief supplies be *wilful* to qualify as war crimes (Article 8(b)(xxv)).

²⁴ Dinstein 2000, supra note 22, pp. 77-92.

²⁵ Barber 2009, supra note 5, p. 378 (citing the tactics used by Sudan, 2006-2009).

neutralisation of which is not outweighed by the imperative to address the humanitarian plight of the civilian population.²⁶

The real snag, however, is that given the decentralised nature of the implementation and supervision of international humanitarian law, there is no independent mechanism that weighs the evidence and checks whether the reasons invoked by states to deny assistance correspond to reality. Accordingly, legitimate reasons could just as well be a smokescreen for what are in reality arbitrary and capricious reasons, e.g. a government may declare with a straight face that it withholds a humanitarian organisation licence to operate on the grounds that the latter deploys activities in rebel-held territory and thus violates the principle of impartiality, while in reality it does so primarily to punish civilians seen as sympathetic to the rebels or to prevent foreign actors from seeing, and possibly making public, atrocities committed by government troops (a scenario which appears to unfold in Syria).

To review the denial of humanitarian access in the context of armed conflicts, there might be some merit in reviving the dormant International Fact-Finding Commission established in 1991 pursuant to Article 90 of the First Additional Protocol to the Geneva Conventions.²⁷ This Commission could examine whether the state indeed has the assistance capacity it claims to have, whether foreign humanitarian actors indeed violate the principles of neutrality and impartiality, or whether the security situation indeed puts humanitarian actors at risk. The Commission has also expressed its desire to enquire into alleged violations of humanitarian law so long as all parties to the conflict agree.²⁸ However, as the Commission has proved to be a still-born child – more than two decades after its establishment it remains inactive – there is little hope that it can be resuscitated for the purpose of establishing the facts with respect to obstacles to humanitarian assistance. Moreover, there is some irony in requesting the Commission to examine the facts informing a state's refusal of consent, given that the state's consent is required to trigger the Commission's jurisdiction in the first place (although a state's refusal to allow in the Commission may result in a presumption of a *mala fide* refusal of aid).²⁹ Finally, even if the Commission were to deliver on its promises, one should bear in

²⁶ Abril Stoffels submitted in this respect that if “an excessively large proportion of the aid is ... diverted and used to supply troops, the duty of the injured party to allow the free passage of aid should be reconsidered, particularly when the situation is particularly prejudicial to the interests of that party and the diverted aid becomes the basis of a war economy”. Abril Stoffels 2004, *supra* note 20, at 542.

²⁷ The Commission was created to “enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol.” (Article 90 AP I at www.ihffc.org (accessed on 6 May 2013);

For assessments of the Commission: E. Kussbach, ‘The International humanitarian fact-finding commission’, 43 *International and Comparative Law Quarterly* 1994-1, pp. 174-185; F. Kalshoven, ‘The International Humanitarian Fact-Finding Commission: A Sleeping Beauty’, *Humanitäres Völkerrecht* 2002-4, p. 214; A. Mokhtar, ‘Will This Mummification Saga Come to an End? The International Humanitarian Fact-Finding Commission: Article 90 of Protocol 1’, *Penn State International Law Review* 2003-22, pp. 243-311; L. Condorelli, ‘The International Humanitarian Fact-Finding Commission: an Obsolete Tool or a Useful Measure to Implement International Humanitarian Law?’, *International Review of the Red Cross* 2001-84, p. 401.

²⁸ IHFFC, *About us – In a few words* at www.ihffc.org (accessed on 6 May 2013).

²⁹ Note that the High Contracting Parties are *not* required to accept the competence of this Commission: Article 90(2)(a) AP I provides, in a clause which is somewhat reminiscent of Article 36(2) of the Statute of the International Court of Justice, that “[t]he High Contracting Parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare that they recognise ipso facto and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to enquire into allegations by such other Party, as authorised by this Article”. Even in respect of Parties to a conflict which have made such a declaration, the Commission can only institute an enquiry at the request of a Party to the conflict with the consent of the other Party or Parties concerned, at least in case of enquiries other than enquiries into any facts alleged to be a grave

mind that the Commission can only establish *facts*. To be sure, clarity about the facts may bring pressure to bear on recalcitrant states to give their consent. But even in the face of evidence that disproves the factual basis underlying their initial motivation to deny access, states might still consider it politically expedient not to give in to pressure. Ultimately, this is the classic conundrum of how one can bring states to comply with rules of international law in the absence of a strong and centralised dispute-settlement and enforcement mechanism.³⁰ Still, the results of the Commission's inquiry may well lay the ground for legal sanctions to be taken against that state by other states or relevant international decision-makers, e.g. the UN Security Council.

III. Sanctioning the Refusal to Give State Consent

This article will not analyse what exact legal sanctions states and international organisations could take against states that unduly withhold their consent to the provision of humanitarian assistance. Rather, it will seek an answer to the question of whether in the absence of, or apart from, institutional sanctions being imposed, *humanitarian actors* could take the law into their own hands and enter the recalcitrant state's territory *clandestinely* with a view to providing humanitarian assistance.

Médecins sans Frontières (MSF), for instance, has occasionally established clandestine hospitals, lately also in Syria, whose government denied access to the organisation.³¹ MSF obviously does so at its own risk, as it is in violation of Syrian law and the organisation may even be targeted by the military for its actions (the latter acts would evidently be in violation of international law, for MSF is not directly participating in hostilities and accordingly cannot constitute a legitimate military target). Under normal circumstances, if it is established that humanitarian actors did not obtain consent to operate, violated the principles of neutrality and impartiality, or did not take (legitimate) governmental technical requirements into account, deportation of humanitarian personnel and confiscation of property are generally considered as legitimate state measures.³²

But could humanitarian actors regard a state's lack of consent as non-existent because it is in violation of international law and argue that the validity of any state sanctions taken is vitiated? The argument that state sovereignty loses its normative power if the state abuses its sovereign prerogatives is certainly compelling here. As early as 1945, Aufricht, clearly having the events in Nazi Germany in mind, propounded in the *Cornell Law Quarterly* that sovereignty is a 'relative' concept in that international law and international interest determine when states could invoke it.³³ This concept of 'relative sovereignty' later incarnated in the Statute of the International Criminal Court as the principle of complementarity, pursuant to which states cannot contest the admissibility of cases of international crimes before the Court if these states have not been able and willing to genuinely investigate and prosecute these cases themselves.³⁴ The moral-political notion of 'responsibility to protect' also echoes the concept of relative sovereignty: under that notion states cannot cite the principles of state sovereignty and non-intervention to ward off interventions of the international community when international crimes are being committed. In the relative sovereignty discourse, sovereignty is

breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol (Article 90(2)(c) and (d)).

³⁰ See H.H. Koh, 'Why Do Nations Obey International Law?', *Yale Law Journal* 1997-106, pp. 2599-2659.

³¹ PRI's The World, 'Saving Lives in a Clandestine Hospital in Rebel-Held Syria' (*phonetic transcript of radio story broadcast*), 29 August 2012 (interviewed doctor stating that MSF has only done so three times in the last 30 years).

³² See on the latter requirements Article 71(3)(c) AP I.

³³ H. Aufricht, 'On Relative Sovereignty', parts I and II, *Cornell LQ* 1944-1945-30, pp. 318-349.

³⁴ Articles 17 and 19 of the Rome Statute of the International Criminal Court.

no longer conceived of as a shield or an excuse, but rather as a responsibility. A state forfeits its sovereignty and its right not to allow foreign actors in if it fails to comply with basic international (humanitarian) law norms. As a result, such a state cannot prevent other actors from assuming *their* 'international' responsibility vis-à-vis populations in need on the territory of the former state, and from overriding the absence of state consent to provide humanitarian assistance.

Nuancing sovereignty and allowing representatives of the international community to intervene with a view to protecting the civilian population does not necessarily imply defending military interventions aimed at creating humanitarian corridors, however. After all, using military force violates peremptory norms of international law if it is not covered by the exceptions set out in Article 2(4) of the UN Charter. But the question remains whether humanitarian actors, including non-governmental actors, could resort to non-forcible measures to protect civilian populations, in particular by entering the state's territory clandestinely with a view to providing much-needed relief in a neutral and impartial fashion. The legal question here is whether such humanitarian actors' *international responsibility* for a possible *internationally wrongful act* – the violation of a state's territorial integrity – is engaged, and if so, whether there are circumstances precluding this wrongfulness.

Arguably, three legal bases could be advanced to justify humanitarian actors' (clandestine) provision of relief despite state consent – allegedly unjustifiably – not having been given. The analysis focuses specifically on *non-state* humanitarian actors (NGOs).

Firstly, it could be argued that NGOs are not bound by international law limitations like the requirement of state consent. In this argument, responsibility issues do not come into play because NGOs are not considered as subjects of the law in the first place. Secondly, clandestine humanitarian action could be grounded on a primary norm of international law allowing, or at least not prohibiting, such relief. In this argument, responsibility issues do not come into play because there is no internationally wrongful act. Thirdly, such action could be viewed as perhaps *in abstracto* wrongful, but nevertheless justified *in concreto* (a) as a countermeasure or (b) by considerations of necessity. This argument assumes that a clandestine NGO operation that overrides the absence of state consent is in principle internationally wrongful and could thus in principle give rise to international responsibility, but that circumstances are present that preclude the wrongfulness of the act.

The first argument goes as follows. As NGOs are generally not bearers of rights and duties under international law, technically speaking, a humanitarian NGO's crossing of a state's border without the state's consent falls outside the purview of international law, and accordingly, is not illegal under international law. There is some support for such a line of reasoning in the case law of the International Court of Justice, which, in the *Kosovo* advisory opinion, held that, because the authors of Kosovo's declaration of independence acted in an unofficial capacity, they were not bound by the Kosovo Constitutional Framework (which was considered to have an international legal character) and could thus not violate it.³⁵ This holding is susceptible to criticism as it artificially shelters governance actors from accountability.³⁶ Nonetheless, it provides authority for the premise that non-state actors (logically including NGOs) are not bound by the international law principle of the territorial integrity of states. Accordingly, they may cross national borders in order to provide

³⁵ ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, I.C.J. Reports 2010, p. 403, para. 105 (the representatives of the Kosovar people 'set out to adopt a measure the significance and effects of which would lie outside that order').

³⁶ See, e.g., C. Ryngaert, 'The ICJ's Advisory Opinion on Kosovo's Declaration of Independence: a Missed Opportunity?', 57 *Netherlands International Law Review* 2010-57, pp. 481-449.

humanitarian aid to a stricken population, even without having obtained prior state consent. This does not mean, however, that states cannot control their borders: after all, individuals and entities have no positive (human) right under international law to enter another state's territory. Hence, whether or not NGOs are bound by the international principle of territorial integrity, states are allowed to take legal action against them on the basis of national immigration law for illegally entering their territory. Ultimately, therefore, this theory fails to grant international law protection to clandestine humanitarian operations and does not stop national authorities from bringing the full force of national law to bear on non-compliant NGOs.

The second theory, by contrast, is more promising in that it purports to ground an international law norm that protects non-consent-based humanitarian assistance. This theory posits that a primary norm of customary international (humanitarian) law has, or is taking shape, which downplays, or even dispenses altogether with the requirement of state consent. Such a norm has not been identified by the ICRC in its leading customary international humanitarian law study, however. Indeed, the study continues to subject the provision of relief to the consent of the territorial state (Rule 55). Nevertheless, a number of authors have argued that the existence, or at least formation, of a permissive customary norm is (in the process of being) evidenced by state practice and *opinio juris*. Abril Stoffels, for instance, submitted that “[t]he lack of international response, formal or otherwise (except, of course, from the affected State) to putting humanitarian aid at the disposal of NGOs and other international organisations to be delivered clandestinely to the victims of conflicts, when humanitarian needs are particularly acute, is sufficient evidence that there is an international norm that, at least *in statu nascendi*, supports the legality of such a course of action”.³⁷ Barber, on her part, wondered whether successive UN General Assembly and Security Council resolutions on the co-ordination of humanitarian assistance and on humanitarian access – which failed to re-affirm the need for state consent – “together with the conduct of states and other official statements, provide evidence of a rule of customary international law requiring states to facilitate humanitarian assistance, whether or not such refusal would lead to starvation or otherwise threaten the survival of a civilian population?”³⁸

These positions are laudable, but they require a specific methodological approach towards customary international law which is open to contestation. Abril Stoffels' apparent discounting of the practice of the non-consenting state(s) is understandable, but for a customary international law norm to come into being, state practice should be universal and include specially affected states (the latter category meaning states for whom a rule holds special relevance, in particular because they are particularly active with respect to the regulated subject-matter, or adversely affected by possible regulation).³⁹ The non-consenting states on whose territory a conflict is taking place – states such as Somalia, Sudan, or Syria – are precisely the states that are especially affected by a rule that relaxes the requirement of state consent regarding the provision of humanitarian assistance. Moreover, even if a relevant customary norm on humanitarian assistance without state consent were to see the light, the said states could well argue that they persistently objected to the content of this norm during its formation period⁴⁰ and accordingly that the norm is not opposable to them. Barber may believe that she can skirt these nettlesome issues by applying the so-called ‘modern’ approach to customary international law formation, pursuant to which, for the formation of a

³⁷ Abril Stoffels 2005, *supra* note 20, p. 536 (footnote omitted).

³⁸ Barber 2009, *supra* note 5, p. 390.

³⁹ ICJ, *North Sea Continental Shelf cases*, Judgment, 20 February 1969, I.C.J. Reports 1969, p. 43, § 74.

⁴⁰ See on the concept of persistent objector in international humanitarian law: C.G. Guldahl, ‘The Role of Persistent Objection in International Humanitarian Law’, *Nordic Journal of International Law* 2008-77, pp. 51-86.

customary norm, a relative lack of uniform physical state practice may be compensated by evidence of strong verbal practice and *opinio juris*.⁴¹ This approach relies heavily on (lofty) statements made by (states in the context of) international organisations, and reintroduces considerations of morality in the ascertainment of customary international law norms. The author of this piece has previously defended this approach, especially as regards humanitarian and human rights norms that are regularly breached, as being consonant with progressive, ‘humanising’ tendencies in international law.⁴² It remains no less true, however, that the ‘modern’ approach to customary law formation is hardly universally shared. From a traditional positivist point of view, therefore, the lack of sufficient practice of states allowing, or supporting, relief operations without the prior consent of the territorial state undermines the claim that a norm limiting the role of state consent has already acquired customary law status. At most, then, it could be argued that such a norm is in the process of formation, without having yet reached a *lex lata* status.

The third legal argument in favour of humanitarian relief operations without state consent starts from the assumption that such operations are not in conformity with primary international obligations – the obligation to respect the territorial sovereignty of the state and the prohibition of interference with the internal affairs of the state in particular – but proceeds to justify or excuse this non-conformity as a countermeasure or using the doctrine of necessity, in accordance with Part V (‘circumstances precluding wrongfulness’) of the ILC Articles on State Responsibility, applied *per analogiam* to the situation of non-state actors. Such arguments appear to be cogent at first sight. Indeed, should humanitarian actors not be allowed to induce compliance by taking unilateral action, and is such action not necessary to safeguard the interests of humanity? Again, however, reliance on countermeasures or necessity to ground a right of humanitarian access in the face of lack of state consent can be contested doctrinally.⁴³

To start with, it is unclear whether humanitarian actors could actually invoke the responsibility of states and rely on circumstances precluding wrongfulness to justify action vis-à-vis a state that refuses to give consent. To be true, *state* or *institutional* humanitarian actors may, as third parties, invoke the responsibility of a non-compliant state on the ground that the humanitarian obligation breached by the state (the failure to consent) is an obligation owed to the international community as a whole.⁴⁴ But it is far less certain whether *non-state* actors could do so as well.

A second contested issue concerns the consequences which could follow from the invocation of responsibility by a third party, whatever its legal personality. Under international law as it now stands, third parties who are entitled to invoke the responsibility of a state may only

⁴¹ The author cites the famous *dictum* of the ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, para. 187, in this respect (“[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”).

⁴² J. Wouters and C. Ryngaert, ‘The Impact of Human Rights and International Humanitarian Law on the Process of the Formation of Customary International Law’, in M. Kamminga and M. Scheinin (eds.) *The Impact of Human Rights Law on General International Law*, Oxford: Oxford University Press 2009, pp. 111-131.

⁴³ Notably Abril Stoffels, *supra* note 20, at 537, has laid out an argument based on countermeasures and necessity, but at the same time she has admitted that her argument “constitutes an interpretation that lies in the grey area between *de lege ferenda* and *de lege lata*.”

⁴⁴ The regime of third parties invoking the responsibility of a state is set out in Article 48 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001), but it is limited to inter-state relations.

claim from the responsible state the cessation of the internationally wrongful act, assurances and guarantees of non-repetition, and the performance of the obligation of reparation to the beneficiaries of the obligation breached.⁴⁵ Self-help by a third party as a countermeasure is controversial, even if taken by non-injured states.⁴⁶

A third problem relates to the qualification of a clandestine operation as a countermeasure. Abril Stoffels has voiced her doubts in this respect, submitting that such an operation does not “serve the purpose of a countermeasure (that of compelling the defaulting State to fulfil its obligations)”.⁴⁷ In my view, there need not be any doubt as to the legitimate characterisation of a clandestine operation as a countermeasure, as such an operation precisely draws the attention of the defaulting state to its failure to provide humanitarian relief and may put pressure on it to change its ways. Once the state provides or allows humanitarian assistance, the clandestine mission can be wound up. This is exactly the function of a countermeasure.

Fourthly, contestation may arise as to humanitarian actors’ reliance on the doctrine of necessity as a circumstance precluding wrongfulness of their establishment of clandestine missions. This doctrine requires proof that the action taken (violation of territorial sovereignty) is the only way for an actor – in the classic view, the state – to safeguard an essential interest against a grave and imminent peril and that this action does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.⁴⁸ It bears emphasis that this essential interest need not be the self-interest of the actor relying on necessity, but could also be a common interest such as the international community’s interest in seeing a civilian population’s right to humanitarian assistance respected.⁴⁹ This broad definition of ‘essential interest’ allows third parties to circumvent the limitations of the countermeasures regime. Admittedly, the ILC has pointed out that humanitarian intervention is not covered by the principle of necessity, but it has only done so in relation to *forcible* intervention, i.e. military action, which is exhaustively regulated by primary obligations regarding the use of force.⁵⁰ This leaves the door open for reliance on necessity to justify the provision of outside humanitarian assistance absent state consent – although the question obviously remains whether *non-state actors*, as opposed to states or international organisations, could also invoke necessity to justify their actions.

IV. Consent Challenges with Respect to Cooperation with Insurgents

A thorny issue touching upon the legitimacy of denial of access is humanitarian actors’ cooperation with insurgents. For practical reasons, humanitarian actors may want to set up

⁴⁵ Article 48 (2) of the ILC Articles on State Responsibility.

⁴⁶ Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected, Commentary (8), p. 129 (“Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic. This chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48, paragraph 1, to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached (art. 54)”).

⁴⁷ Abril Stoffels 2005, *supra* note 20, p. 536.

⁴⁸ Article 25(1) ILC Articles on State Responsibility.

⁴⁹ See, e.g., the *Russian Fur Seals* controversy (1893), cited in Commentary (6) to Article 25 of the ILC Articles on State Responsibility, *supra* note 46, p. 81.

⁵⁰ Commentary (21) to Article 25 of the ILC Articles on State Responsibility, *supra* note 46, p. 84.

clandestine missions in areas that are not, or hardly, controlled by the government, but by armed groups. In a recent interview, the General Director of MSF stated that the organisation was assisted in setting up hospitals by a senior commander of the Free Syrian Army. He added that the MSF should keep its distance from this insurgent group, but that the reality was that it could not work in the remote Syrian mountains without the insurgents' knowledge of the terrain.⁵¹

Such cooperation could compromise humanitarian actors' hallowed impartiality and provide the government with a good reason to revoke consent, even if prior consent had been given, or to take harsh sanctions against the humanitarian organisation. In my view, 'impartiality' should be given a flexible interpretation. Prohibiting any contact whatsoever with any of the warring parties might simply make the provision of humanitarian assistance impossible, as would the requirement that humanitarian organisations provide assistance to all populations under the control of all parties to the conflict.⁵² Only if there is clear evidence that an organisation is *assisting* a party, and thereby strengthening its military capacity, may the other party legitimately claim that the organisation has violated its obligation of impartiality.⁵³ In the context of clandestine hospitals, this obligation may for instance be violated if the organisation treats insurgent as opposed to civilian casualties, although admittedly it will not be easy for the organisation to identify a casualty as either civilian or insurgent (e.g. insurgents may well wear civilian clothing). In any event, a flexible rule on impartiality may encourage outside humanitarian organisations to abandon their current reluctance to venture into conflict zones, and will thus ultimately benefit the civilian population.⁵⁴

However, recently and most unfortunately, risks to humanitarian operations in rebel-held territory have not only emanated from the territorial state, but also from other states that put draconian anti-terrorism laws in place that equate cooperation with insurgent 'terrorist' groups with providing material assistance to terrorism.⁵⁵ A U.S. federal statute which prohibits knowingly providing material support or resources to foreign terrorist organisations⁵⁶ is a case in point: vague definitions open the door to the criminalisation of humanitarian interactions with insurgent groups that are listed on the U.S. terrorism list. In order to obtain access to rebel-held territory, humanitarian organisations may have to collaborate in one way or another with local insurgents, and in so doing risk finding themselves on the wrong side of the law if their collaboration can somehow be interpreted as

⁵¹ Dagboek (*diary*) Christopher Stokes, General Director of MSF, *De Standaard Weekblad* (Belgium), 22 December 2012, p. 66.

⁵² Abril Stoffels 2005, *supra* note 20, at p. 541, has convincingly argued against the concept of 'overall impartiality', in that "the enshrinement of this form of impartiality in IHL would provide parties with another weapon to wield in the refusal of aid for the population of the adverse party, thus having the opposite effect to the one intended."

⁵³ MSF's General Director has noted that foreign humanitarian organisations may often be considered as more impartial than local NGOs, which often belong, or are seen to belong to a party to the conflict. Unfortunately, however, in this view, Western aid organisations increasingly rely on local people and in that way their own skillset with respect to providing relief has dwindled. Dagboek, *supra* note 51, p. 67.

⁵⁴ It is observed that attacks against humanitarian workers are under all circumstances prohibited, whether they work openly or clandestinely. This protection of the law should further encourage them to enter conflict zones. As long as humanitarian workers do not directly participate in hostilities, they cannot be the object of an attack. See for an explanation of the concept of 'direct participation in hostilities': Int'l Comm. of the Red Cross (ICRC), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009). See for war crimes committed against civilians, humanitarian workers, and hospitals: Article 8 (2) (b) (i-iii and ix), and (e) (i – iv) of the Rome Statute of the International Criminal Court.

⁵⁵ N.K. Modirzadeh, D.A. Lewis & C. Bruderlein, 'Humanitarian engagement under counter-terrorism: a conflict of norms and the emerging policy landscape', *International Review of the Red Cross* 2011-883, p. 624.

⁵⁶ 18 U.S.C. para. 2339B(a)(1); para. 2339B(g)(4); para. 2339A(b)(1).

providing ‘advice or assistance’ to the insurgents.⁵⁷ Much will obviously depend on how wide the U.S. enforcement authorities are truly willing to cast the net. Major judicial limitations are not expected in this respect. In a pre-enforcement constitutional challenge brought before the U.S. Supreme Court by the Humanitarian Law Project (HLP)⁵⁸ concerning an NGO’s provision of training and teaching to an insurgent/terrorist group and its engagement in political advocacy, the Supreme Court held in 2010 that terrorist organisations “are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct”,⁵⁹ and went on to uphold the constitutionality of the statute.

Admittedly, HLP’s interactions with the insurgent group went beyond the mere provision of humanitarian relief to populations in rebel-held territory, but a scenario of an NGO currying favour with insurgent groups by granting some material assistance, however small, in exchange for humanitarian access, is not necessarily far-fetched. Such assistance would squarely fall within the statutory prohibitions of U.S. law and expose NGO personnel to criminal liability. Such liability may, disquietingly, even arise under the universality principle, by virtue of which NGO personnel or conduct need not even have any link to the U.S. for prosecution to be initiated except territorial presence (whether forcible or voluntary).⁶⁰

If anything, the risks to humanitarian action presented by the U.S. law demonstrate that consent for humanitarian assistance may not only have to be secured from the state on whose territory relief is given, but also from the NGO’s home state and even from *any* state that has any expansive counter-terrorism laws in place. However, securing such consent is not straightforward, as criminal law enforcers typically operate *post factum* and do not give advance consent or exemptions for activities that could potentially breach the law.

Another consent issue that deserves some reflection concerns the necessity of securing the consent to mount a humanitarian operation from *armed groups themselves*, rather than from states. As is known, contemporary armed conflicts do typically not pit states against other states, but rather states against *non-state* armed groups (armed opposition groups or other armed bands), which may control portions of the state’s territory. The question then arises whether the requirement of state consent also extends to areas that are controlled by armed groups, and whether in that case those armed groups are the beneficiaries of the right to give or refuse consent.

Legally speaking, the requirement of state consent applies to humanitarian assistance provided anywhere on the state’s territory, whether or not this territory is fully under state control. But from a practical perspective, it appears that requiring state consent in relation to areas that are not controlled by the government is futile. In these areas, the state cannot enforce transgressions of its sovereignty, and humanitarian actors will be free to ship humanitarian goods across the border, provided obviously that they can secure the consent of the armed groups that are in control of the relevant territory. It remains unclear, however, whether an armed group’s consent amounts to more than just a practical necessity:⁶¹ is the armed group’s consent also a requirement under *international law*?

⁵⁷ U.S.C. para. 2339A(b)(3) defines as “advice or assistance derived from scientific, technical, or other specialised knowledge”.

⁵⁸ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (Sup.Ct.2010).

⁵⁹ *Idem.*, 2710, 2724, 2729.

⁶⁰ 18 U.S.C. para. 2339B(d)(1)(C), providing for jurisdiction over any individual who is in violation of the statute and is later ‘brought into or found in the [U.S.], even if the conduct required for the offense occurs outside [the U.S.]’.

⁶¹ See on the latter Spieker 2011, *supra* note 10, p. 16.

The Geneva Conventions remain silent on the issue of non-state actors' consent to humanitarian assistance, although they do impose on these actors *obligations* under international humanitarian law.⁶² Academic writings, however, increasingly pay attention to the phenomenon of non-state actors, and the consequences thereof in terms of international legal personality.⁶³ It has for instance been argued rather convincingly that - to the extent that non-state actors take over governance functions and control portions of the state's territory as 'agents of necessity' - they are the addressees of public international law norms.⁶⁴ The provision of humanitarian assistance, and decisions on outside help, are such 'governance necessities' that are subject to international law. Accordingly, armed groups - while not embodying (but perhaps aspiring to) sovereignty - may, as far as the regime of humanitarian assistance is concerned, be bound by exactly the same norms as the state. This implies that humanitarian actors may have to seek the consent of the armed group, as both a practical and a legal imperative. But it also implies that the armed group cannot withhold its consent in an arbitrary or capricious manner.

V. Concluding Observations

Under international law, except in situations of occupation, states do not seem to be under a hard legal obligation to give consent and grant access to humanitarian actors. Still, the treaties clearly urge states to give consent. By now it is broadly accepted that states cannot deny access for arbitrary or capricious reasons. The reality remains, however, that some states continue to deny access to outside actors wishing to assist the civilian population, even if a humanitarian tragedy is undeniably taking place. In the face of such inhumanity, humanitarian actors may decide to enter the conflict or disaster zone regardless. The legality of such operations is contested under international law. Yet it is arguable, at least in a progressive reading of the law, that a customary international law norm has formed, or is forming, that allows for such clandestine humanitarian action. Alternatively, such action may, under secondary norms of responsibility applicable to non-state actors, be justified by considerations of necessity or as a countermeasure against a prior illegal act of the state.

The foregoing considerations, which focus on the *state*, are important but may be of limited relevance to the provision of humanitarian assistance in territories controlled by non-state armed groups. Requiring consent of the territorial state as regards to such assistance serves little purpose, whereas the consent to operate of the armed group is crucial. If the armed group controls a portion of a state's territory and exercises governance functions there, it may arguably avail itself of a state-like humanitarian consent regime, including the 'qualified' right to refuse access. As the humanitarian situation in territories (temporarily) held by insurgents is often dire, however, commanders will be unlikely to come up with acceptable reasons to deny access.

Yet for humanitarians, securing consent is not necessarily the major challenge when dealing with armed groups. Even more challenging may be devising a strategy to balance two conflicting imperatives: the need to approach armed groups with a view to assisting the civilian population, and the need to operate at arm's length from such groups so as not to

⁶² See for those obligations: 1949 Geneva Conventions, Common Article 3 & 1977 First Additional Protocol to the Geneva Conventions Article 1.

⁶³ See, e.g., M. Noortmann and C. Ryngaert (eds.), *Non-State Actor Dynamics in International Law: from Law-Takers to Law-Makers*, Aldershot: Ashgate 2010, pp. 204.

⁶⁴ B. Rudolf, 'Non-State Actors in Areas of Limited Statehood as Addressees of Public International Law Norms on Governance', *Human Rights and International Legal Discourse* 2010-4, p. 127 (2. See on humanitarian obligations flowing from non-state actors' control over territory: Barber 2009, supra note 5, at 384-385 (suggesting that "the full suite of occupiers' obligations concerning the provision of humanitarian assistance could be said to apply to armed opposition groups who control vast amounts of territory").

forfeit the government's licence to operate, and to avoid liability in third states for illegally engaging with terrorist groups. It is hoped that, in the years to come, some best practices – on all sides – can be developed in this respect.