



Diakonia
International
Humanitarian
Law Centre

Legal Brief

HUMANITARIAN DEMINEAS AS A FORM OF HUMANITARIAN ASSISTANCE UNDER INTERNATIONAL HUMANITARIAN LAW

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TABLE OF ABBREVIATIONS

AP I	Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977)
AP II	Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1977)
ARC	Active Range Clearance
CCPR	Human Rights Committee (Committee for Civil and Political Rights)
CESCR	Committee for Economic Social and Cultural Rights
CM	Countermine
CRC	Convention for the Rights of the Child (1989) or Committee for the Rights of the Child
CSO	Civil Society Organisation
DARIO	Draft Articles on the Responsibility of International Organisation for Internationally Wrongful Acts (2011)
DARSIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001)
EOD	Explosive Ordnance Disposal
ERW	Explosive Remnants of War
GC I	Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949)
GC II	Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949)
GC III	Geneva Convention III relative to the Treatment of Prisoners of War (1949)
GC IV	Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (1949)
GICHD	Geneva International Centre for Humanitarian Demining
IAC	International Armed Conflict
IACG-MA	Inter-Agency Coordination Group on Mine Action
ICC	International Criminal Court
ICCPR	International Covenant for Civil and Political Rights (1966)
ICESCR	International Covenant for Economic, Social and Cultural Rights (1966)

ICRC	International Committee of the Red Cross
IED	Improvised Explosive Device
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IMSAM	Information Management System for Mine Action
IO	International Organisation
MMD	Metal Mine Detector
MRE	Mine Risk Education
NGO	Non-Governmental Organisation
NIAC	Non-International Armed Conflict
NSAG	Non-State Armed Group
UER	UXO Environmental Remediation
UN	United Nations
UN-CMCOORD	UN Humanitarian Civil-Military Cooperation
UNGA	United Nations General Assembly
UNICEF	United Nations International Children's Emergency Fund
UNMAS	UN Mine Action Service
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UXO	Unexploded Ordnance

EXECUTIVE SUMMARY

This Brief argues that humanitarian demining satisfies the criteria for humanitarian assistance under the Geneva Conventions of 1949 and their Additional Protocols¹. Accordingly, parties to the conflict that are unable to adequately provide for the civilian populations under their control have an obligation not to arbitrarily refuse offers of humanitarian demining assistance or to remove the necessary equipment, subject to rights of control and supervision. Where consent is granted, the concerned party is obliged to facilitate the implementation of humanitarian demining operations.

What is humanitarian demining?

Humanitarian demining is the physical removal or deactivation of abandoned mines, explosive remnants of war (ERW), and improvised explosive devices (IEDs) to protect civilians from their indiscriminate effect, facilitate a return to ordinary civilian life and, where applicable, ensure the delivery of humanitarian aid. Humanitarian demining differs from military demining because it: (a) aims for complete mine clearance to make an area safe for civilians; (b) does not accept deminer casualties as an operational reality and therefore must adhere to strict safety standards at all times; and (c) must have a distinctly humanitarian, non-military purpose.

Who has the primary responsibility to conduct humanitarian demining?

Under international humanitarian law (IHL), parties to the conflict have an obligation to provide civilians living on the territory under their control with supplies essential for their survival. Due to the fact that mines indiscriminately affect the civilian population and prevent the delivery of essential humanitarian supplies during armed conflict, it is submitted that the obligation to meet the essential needs of the civilian population may include an obligation to facilitate humanitarian demining. Under international human rights law (IHRL), States also have a primary obligation to

ensure the essential rights of the civilian population under their effective control. Given the impact that abandoned anti-personnel mines have on the realisation of human rights, including the rights to life, health, water, adequate housing and the rights of the child, it is submitted that this obligation under IHRL may include an obligation to facilitate humanitarian demining. Where warring parties are unable to fulfil these obligations themselves, they are required to cooperate with neutral third States and impartial humanitarian organisations.

Who is entitled to offer humanitarian demining assistance?

Under IHL, impartial humanitarian organisations are entitled to offer humanitarian assistance in situations where the civilian population is inadequately supplied. Impartial humanitarian organisations are defined as entities whose mission is to prevent and alleviate suffering in armed conflict while acting effectively and are worthy of trust due to their humanitarian and impartial nature. Humanitarian assistance is defined as activities aimed at preserving life and personal security, alleviating suffering, and addressing the essential needs of victims of armed conflict that are provided in accordance with the “fundamental principles” of humanity, impartiality, neutrality, and independence. To varying degrees, the fundamental principles of humanitarian assistance have come to represent a legal threshold for defining humanitarian activities as “humanitarian assistance” under IHL. Humanity, impartiality, and neutrality as non-engagement in the hostilities are definitional prerequisites for the provision of humanitarian assistance. Neutrality as non-politicisation and independence are operational principles that are necessary to obtain access and conduct humanitarian activities in accordance with the principles of humanity and impartiality.

Can humanitarian demining be classified as humanitarian assistance under international law?

Firstly, as explained above, humanitarian demining is necessary to protect civilians from the indiscriminate effect of abandoned anti-personnel mines during armed conflict and to facilitate the

1. This Brief has been prepared by Matias Thomsen (Doctoral candidate - University of Tasmania, Faculty of Law) and Thomas Assaker (Legal Advisor - Diakonia) for Diakonia Lebanon IHL Resource Desk.

delivery of life-saving humanitarian aid, such as food, shelter, and medical supplies. Thus, it falls within “humanitarian activities” essential to the survival of the civilian population under IHL.

Secondly, humanitarian demining is capable of complying with the fundamental principles of humanity, impartiality, neutrality, and independence for the following reasons:

1. Humanitarian demining prioritises its services on the basis of humanitarian need. It is therefore compliant with the principle of humanity.
2. Humanitarian demining can be conducted solely on the basis of need and without adverse discrimination in accordance with the principle of impartiality.
3. Humanitarian demining can be conducted without providing a definite military advantage to a party to the conflict or engaging in controversies of a political, religious or ideological nature in compliance with the principle of neutrality.
4. Humanitarian demining can be operationally independent from other actors so as to ensure that it is not subservient to external priorities and may deliver its services in accordance with the above principles. It is therefore capable of complying with the principle of independence.

Where humanitarian demining complies with the above principles, it should be classified as a form of humanitarian assistance under the Geneva Conventions of 1949 and their Additional Protocols.

Due to the nexus between demining activities and military objectives, humanitarian demining may pose a special risk to the principle of neutrality. The party to the conflict that is facilitating the humanitarian demining operation, for instance, may use it to further its military objectives or deprive the opposing side of a definite military advantage. To minimise such risks of providing a definite military advantage, humanitarian demining organisations should limit their activities to the removal of abandoned anti-personnel mines in civilian-populated areas away from the conduct of hostilities.

Three, mutually reinforcing, arguments are presented in support of this conclusion:

1. Since the mines are “abandoned” and no longer serving a military purpose, their removal does not provide a “definite military advantage”

to the party on whose territory the mines are removed nor it deprives such an advantage from the party who laid the mines.

2. Where the presence of such mines only has an “indiscriminate effect on civilians”, their removal does not provide a military advantage. It is simply a means of complying with that State’s obligation under customary IHL to limit the indiscriminate effects of mines.
3. Where abandoned mines will have an indiscriminate effect or have been laid in a deliberate attempt to target civilians, their removal is not to be considered as an engagement in hostilities. The UN Security Council has stated that action taken to prevent a violation of IHL’s core rules, such as the prohibitions on attacking on civilians or obstructing humanitarian aid, shall not be regarded as an interference in the conflict or a violation of the principle of neutrality.

Limiting humanitarian demining to the removal of abandoned mines outside the conduct of hostilities is therefore necessary to comply with the principle of neutrality.

Can humanitarian demining equipment be removed from a humanitarian convoy?

Humanitarian demining assistance is subject to the consent of the affected State under IHL, except in cases of occupation or a United Nations Security Council (UNSC) resolution that explicitly overrides the requirement of consent. States are under an obligation not to arbitrarily refuse offers of humanitarian demining assistance or remove the necessary equipment. The legal consequences of an arbitrary refusal are limited and do not permit humanitarian assistance to be delivered by force, which is why seeking consent remains crucial from a practical, operational and security perspective.

Where consent is obtained to provide humanitarian demining assistance, the concerned party is under an obligation to facilitate the mission and provide the necessary protection of the humanitarian convoy. However, the concerned party retains the right of control, which includes the right to inspect the humanitarian convoy and remove any items, such as demining equipment, that provide a definite military advantage to the belligerent party.

1. INTRODUCTION

Mines, ERW, and IEDs disproportionately impact the civilian population. Between 2015 and 2018, Landmine Monitor recorded 30,560 casualties (defined as death or serious injury) resulting from landmines. Civilians accounted for approximately 80 percent of all victims.² According to the UN Children’s Fund (UNICEF), one million individuals have been victims of mines since 1975, one-third of whom are children under the age of fifteen.³ In addition to the direct impact that mines have on civilians, their presence impedes the delivery of food, shelter, medical supplies, and other essential humanitarian aid, further exacerbating the humanitarian crisis.

In response, the international community has come together to strengthen the applicable legal framework to protect civilians from the indiscriminate effect of mines and facilitate humanitarian assistance, in particular through Protocol II to the Weapons Convention⁴ and the Anti-Personnel Mine Ban Treaty.⁵ The UN General Assembly has repeatedly expressed its concern at

the “tremendous” humanitarian problem caused by mines, noting in particular the threat posed to civilians and humanitarian aid organisations, and has called upon states to provide humanitarian demining assistance and technical expertise.⁶ The UN Security Council has similarly expressed its concern about “the number of civilians, including children, killed or maimed by landmines, explosive remnants of war and improvised explosive devices, in conflict and post conflict situation”,⁷ called upon “all parties to armed conflicts to end immediately and definitively any indiscriminate use of explosive devices in violation of international humanitarian law”,⁸ and stressed the importance of considering mine action as part of humanitarian emergency responses.⁹ In a series of Resolutions on the situation in Syria, the Security Council has specifically demanded that all parties to the conflict facilitate humanitarian access and called for “humanitarian mine action to be accelerated as a matter of urgency”.¹⁰

Given the indiscriminate effect of mines on the civilian population, humanitarian demining is a direct form of assistance necessary to save the lives of people living in affected communities. Furthermore, humanitarian demining is necessary to facilitate other forms of essential aid, such as food, shelter, and medical supplies, by making an area safe for humanitarian relief organisations to operate. However, despite this objective humanitarian need, humanitarian convoys carrying the necessary demining equipment are frequently stopped at checkpoints and refused entry unless the demining equipment is

2. Landmine and Cluster Munitions Monitor, Landmine Monitor 2019, Report, 21st Annual Edition (November 2019), <http://www.the-monitor.org/media/3074086/Landmine-Monitor-2019-Report-Final.pdf>, (hereafter Landmine Monitor 2019 Report) p. 54.

3. Doctors Without Borders, “Mines”, The Practical Guide to Humanitarian Law (2013), <https://guide-humanitarian-law.org/content/index/>. (hereafter MSF 2013 Practical Guide).

4. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Geneva, 10 October 1980, in force 2 December 1983), UNTS Vol. 1342, p. 137 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&clang=_en, Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Geneva, 3 May 1996, in force 3 December 1998), UNTS Vol. 2048, p. 93, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2-b&chapter=26&clang=_en, hereafter: Protocol II to the Weapons Convention. (Protocol II to the Weapons Convention currently has 125 member States. However, it is considered a codification of the prohibition on the indiscriminate use of mines under customary IHL.

5. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997, in force 1 March 1999), UNTS Vol. 2056, p. 211, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-5&chapter=26&clang=_en. While it was concluded in Oslo, the Convention was opened for signature in Ottawa, which is why it is sometimes referred to as the “Ottawa Convention”. It will be referred to hereafter as the Anti-personnel Mine Ban Treaty.

6. See e.g.: UNGA, Resolution 70/80, Assistance in Mine Action, A/RES/70/80 (9 December 2015), <https://undocs.org/en/A/RES/70/80>, preamble, lit. 4 and para. 3. Every year between 1998 and 2019, the UN General Assembly has issued at least one Resolution in which it calls upon States to address the humanitarian problem caused by mines.

7. UNSC Resolution 2365, S/Res/2365/2017 (30 June 2017), [https://undocs.org/S/RES/2365\(2017\)](https://undocs.org/S/RES/2365(2017)), preamble, lit. 6. For the meeting coverage, see “Security Council Approves First Stand-Alone Text on Mine Action, Unanimously Adopting Resolution 2365 (2017)”, available at <https://www.un.org/press/en/2017/sc12897.doc.htm> (last accessed 13 February 2020).

8. UNSC Resolution 2365 (2017), para. 2.

9. Ibid, para. 10.

10. UNSC Resolution 2401, S/RES/2401 (24 February 2018) para. 11.

removed. Recent examples of denial of access for humanitarian demining equipment have occurred in the Syrian context.¹¹ Due to the fact that humanitarian demining is not yet explicitly recognised as a form of humanitarian assistance under IHL, organisations delivering this essential service have found it difficult to negotiate access and affected communities have been denied the right to life-saving assistance.

This Brief seeks to overcome this gap by demonstrating that humanitarian demining can be classified as a form of humanitarian assistance on the basis that it is capable of complying with its fundamental principles; namely, humanity, impartiality, neutrality, and independence. Accordingly, parties to the armed conflict that have failed to adequately provide for the civilian populations under their control are under an obligation not to arbitrarily refuse offers of humanitarian demining assistance or remove the necessary equipment. Once consent has been provided, the personnel and objects within the humanitarian convoy are entitled to special protection under IHL,¹² which would include the necessary humanitarian demining equipment. The party to the conflict that has granted access into its territory is also under an obligation to ensure the safety of the humanitarian organisation and facilitate the implementation of humanitarian demining within the territory under its control.¹³

Section 2 of this Brief defines humanitarian demining as the physical removal or deactivation

of abandoned mines, ERW, and IEDs to protect civilians from their indiscriminate effect, facilitate a return to ordinary civilian life and, where applicable, ensure the delivery of humanitarian aid. It provides a brief history of humanitarian demining operations and notes how it became a distinct field with its own definitional rules and boundaries. Most notably, humanitarian demining is distinguishable from military demining because it: (a) aims for complete mine clearance to make an area safe for civilians; (b) does not accept deminer casualties as an operational reality and therefore must adhere to strict safety standards at all times; and (c) must have a distinctly humanitarian, non-military purpose.

Section 3 argues that warring parties have the primary responsibility to conduct or facilitate humanitarian demining under both IHL and IHRL. Under IHL, parties to an armed conflict have an obligation to provide civilians under their effective control with supplies essential for their survival. The concept of “supplies essential for the survival of the civilian population” includes food, shelter, and medical supplies, but is deliberately non-exhaustive so that it may be applied on a case-by-case basis. Due to the fact that mines indiscriminately effect the civilian population and prevent the delivery of essential humanitarian supplies during armed conflict, it is submitted that humanitarian demining is essential for the survival of the civilian population and therefore falls within the obligation of the State or territorial authority. Under IHRL, States (and arguably non-State territorial authorities) also have an obligation to ensure the essential rights of the civilian population under their effective control. It is submitted that humanitarian demining is necessary to fulfil several of these rights and is therefore included within this obligation. Where the State or non-State authority is unable to fulfil these obligations themselves, they are required to cooperate with neutral third States and impartial humanitarian organisations.

Section 4 examines the rule that, where the civilian population is inadequately provided for, impartial humanitarian organisations may offer humanitarian assistance. “Impartial humanitarian organisations” are defined as entities whose mission is to prevent and/or alleviate suffering in armed conflict and who are capable of acting effectively and are worthy of trust due to the humanitarian and impartial nature of the

11. See e.g.: Alexandra BRADFORD, “Women at the forefront of humanitarian demining efforts in Syria”, Syria Deeply, (8 November 2017), <https://www.newsdeeply.com/syria/articles/2017/11/08/women-at-forefront-of-humanitarian-demining-efforts-in-syria>, explaining not only women’s role in landmine clearing and risk education, but also the challenges faced for equipment to access contaminated sites; Ahmad RAMADAN, “Landmines, the silent killers in Syria war”, The Arab Weekly (18 March 2016), <https://the arabweekly.com/land-mines-silent-killers-syria-war>.

12. The main rules on the special protection of humanitarian relief personnel are: Art. 71(2) of AP I; Rule 31 of the ICRC Study on Customary IHL; Art. 8(2)(b)(iii) of the Rome Statute; Art. 7(2) of the Convention on the Safety of UN Personnel. The main rules on the special protection of humanitarian relief objects are: Art. 59 of GC IV; Art. 70(4) of AP I; Rule 32 of the ICRC Study on Customary IHL; Art. 8(2)(b)(iii) of the Rome Statute. Please refer to bibliography for complete reference to these legal instruments.

13. The main rules on the obligation to facilitate humanitarian access are: Art. 23 of GC IV; Art 70(2) of AP I; Rule 55 of the ICRC Study on Customary IHL. The main rules on the freedom of movement of humanitarian relief personnel are: Art. 71(3) of AP I; Rule 56 of the ICRC Study on Customary IHL; Art. 12 of Protocol II to the Weapons Convention.

organisation. Organisations offering humanitarian demining assistance would therefore need to satisfy this definition. “Humanitarian assistance”, meanwhile, has two components: (1) it comprises “humanitarian activities” that are aimed at preserving life and personal security, alleviating suffering, and addressing the essential needs of victims of armed conflict; and (2) those activities must be provided in accordance with the “fundamental principles” of humanity, impartiality, neutrality, and independence. To varying degrees, the fundamental principles of humanitarian assistance have come to represent a legal threshold for defining humanitarian activities as “humanitarian assistance” under IHL. Humanity, impartiality, and neutrality as non-engagement in the hostilities have a firm basis in the Geneva Conventions and Additional Protocols and are thus definitional prerequisites for the provision of humanitarian assistance. Neutrality as non-politicisation and independence are considered as “operational principles” that are generally necessary to obtain access to affected communities and conduct humanitarian activities in accordance with the principles of humanity and impartiality.

Section 5 considers whether humanitarian demining can be classified as “humanitarian assistance” under IHL. It is submitted that humanitarian demining is capable of satisfying both limbs of the definition of humanitarian assistance. Firstly, humanitarian demining is necessary to protect civilians from the indiscriminate effect of abandoned anti-personnel mines and facilitate the delivery of life-saving assistance, such as food, shelter, and medical supplies. Humanitarian demining is therefore a “humanitarian activity” as defined under IHL. Secondly, humanitarian demining is capable of complying with each of the fundamental principles of humanitarian assistance. Where humanitarian demining is prioritised on the basis of humanitarian need and conducted without adverse distinction, it complies with the principles of humanity and impartiality. Where humanitarian demining operations are limited to removing abandoned anti-personnel mines from civilian-populated areas, away from the conduct of hostilities, they do not provide a “definite military advantage” to a party to the conflict and therefore comply with this component of neutrality. Finally, where humanitarian demining organisations are sufficiently independent and politically neutral so

as to obtain access to affected populations and conduct their activities on the basis humanitarian need without political interference, they will comply with the operational principles of neutrality and independence.

Section 6 examines the limitations on the right of the affected State or territorial authority to remove humanitarian demining equipment from a humanitarian convoy. Humanitarian assistance is subject to the consent of the territorial state or controlling authority and, outside explicit authorisation from the UN Security Council, such assistance cannot be imposed on a party without its consent. However, presuming humanitarian demining is recognised as a form of humanitarian assistance under IHL, the relevant territorial authority is under a legal obligation not to refuse such offers of humanitarian assistance or remove the necessary humanitarian objects arbitrarily. The existence of this legal obligation alone may encourage more States and non-State armed groups to facilitate humanitarian demining assistance and should therefore be widely publicised. Where consent has been provided, the affected State or territorial authority is under an obligation to facilitate the humanitarian demining assistance and provide the necessary protection of the mission. However, they also retain the rights of control and supervision and may therefore inspect the humanitarian convoy and remove any items that risk providing a definite military advantage to a party to the conflict. Due to the possibility for humanitarian demining equipment to be misused and repurposed to achieve military objectives, there are several perceivable instances where removing such equipment or refusing access would not be considered arbitrary. Accordingly, humanitarian demining organisations should provide assurances that they will: (i) destroy deactivated mines so that they cannot be reused; (ii) not apportion blame for mines that may have been laid in violation of international law; and (iii) conduct their activities in accordance with the fundamental principles of humanitarian assistance.

Section 7 discusses the consequences of unlawfully impeding humanitarian assistance, whether through an unlawful withholding of consent or by failing to fulfil the obligation to protect and facilitate the provision of humanitarian assistance where consent has been provided. In short, unlawfully impeding humanitarian assistance amounts to

an internationally wrongful act and may attract sanctions or countermeasures under international law. In extreme cases, it could independently violate another rule of international law and attract State or individual criminal responsibility. The consequences for the actors seeking to provide humanitarian demining assistance depend on a number of factors. A binding UNSC Resolution authorising cross-border relief overrides the requirement of consent. In all other cases, providing assistance without the consent of the affected State, even if it has been unlawfully withheld, is legally uncertain and may amount to an unlawful interference in the sovereign affairs of that State. However, such conduct may be excused under the doctrines of countermeasures or necessity.

Section 8 concludes and provides a list of recommendations for organisations seeking to offer humanitarian demining assistance in conflict or post-conflict situations. It is hoped that by classifying humanitarian demining as a form of humanitarian assistance under IHL, it will pressure parties to an armed conflict that are unwilling or unable to deal with the impact of abandoned mines to accept offers of humanitarian demining assistance.

2. WHAT IS HUMANITARIAN DEMINING?

Demining can be understood as the physical removal or deactivation of mines, ERW, and IEDs. The term “humanitarian demining” refers to demining operations that comply with three fundamental criteria: (1) the operations aims for the complete removal of all mines so as to allow civilians to return to daily life (usually referred to as “mine clearance”); (2) casualties to deminer personnel are not acceptable and safety standards must therefore be adhered to at all times;¹⁴ and (3) the purpose must be humanitarian and cannot be seen as favouring a particular side to the conflict or as engaging in hostilities.¹⁵ The term “humanitarian demining” is therefore used to distinguish such operations from “military demining” or “breaching”, which has a fundamentally different mode of operation and purpose. Military demining is designed to clear a path to facilitate the movement of troops or to neutralise a threat, casualties are often accepted as an operational reality, and the purpose is to achieve a military or tactical advantage.¹⁶ Military demining is by definition an engagement in the conduct of hostilities.

Humanitarian demining is one of the five pillars of “humanitarian mine action”, a concept developed by the UN Mine Action Service (UNMAS) and the Geneva International Centre for Humanitarian Demining (GICHD) to encompass the full spectrum of activities involved in protecting civilians from the effects of mines. This Brief uses the term “humanitarian demining”, but it is important to remember that humanitarian demining is a component of and therefore included in any reference to “humanitarian mine action”. The five pillars of humanitarian mine action are as follows:

Mine and unexploded ordnance awareness and risk reduction education. Commonly referred to as “mine risk education” (MRE), this pillar is essential in reducing the number of civilian casualties in mine-affected areas through education and awareness.

Minefield survey, mapping, marking, and clearance. Commonly referred to as “humanitarian demining” or “humanitarian mine clearance”, this pillar refers to the identification and physical removal of mines in compliance with UN safety standards, clearance rates, and humanitarian purposes. Humanitarian demining is usually undertaken as a part of comprehensive and systematic land release.¹⁷

Land Release is the process of applying all reasonable effort to identify, define, and remove all presence and suspicion of mines and explosive remnants of war through non-technical surveys,¹⁸ technical surveys,¹⁹ marking,²⁰ and/or clearing.²¹

Mine clearance is the identification and removal or destruction of all mines and explosive remnants of war hazards from a specified area to a specified depth to ensure the land is safe for land users.

Victim assistance, including rehabilitation and reintegration. This pillar aims to address the shortcomings of earlier humanitarian demining missions by mitigating the suffering of mine victims through medical attention, physical rehabilitation and prosthetics, and reintegration into the community.

Advocacy to stigmatise the use of landmines and support a total ban on anti-personnel landmines. This pillar uses advocacy in a variety of forums

14. See International Mine Action Standards (IMAS), Standards & Technical Notes, <https://www.mineactionstandards.org/en/standards/>.

15. UNOCHA - ReliefWeb, Glossary of humanitarian terms (August 2008), www.reliefweb.int/glossaries (hereafter UNOCHA 2008 Glossary), p. 35, “Mine Action”.

16. Geneva International Centre for Humanitarian Demining (hereafter GICHD), Mine Action: Lessons and Challenges, Geneva (November 2005) https://www.gichd.org/fileadmin/GICHD-resources/rec-documents/Mine_Action_Lessons_Nov2005.pdf, p. 20.

17. IMAS, Standards & Technical Notes, op. cit., “07.11 - Land Release” and “09.60 Underwater Survey and Clearance of Explosive Ordnance”.

18. IMAS, Standards & Technical Notes, op. cit., “08.10 Non-technical survey”.

19. IMAS, Standards & Technical Notes, op. cit., “08.20 Technical Survey”.

20. IMAS, Standards & Technical Notes, op. cit., “08.40 Marking mine and ERW hazards”.

21. IMAS, Standards & Technical Notes, op. cit., “09.10 Clearance Requirements”.

to limit the use of mines, facilitate humanitarian demining operations by gaining the consent of the territorial authority, and to promote a total ban on anti-personnel landmines. When engaging with NSAGs, the GICHD has achieved success in relation to this pillar by encouraging such groups to sign a “Deed of Commitment” not to use anti-personnel mines.

Stockpile destruction, to ensure that stockpiles of landmines are destroyed. This pillar aims to promote and facilitate the destruction of stockpiled anti-personnel mines so as to prevent them from being reactivated in conflict situations and to work towards the goal of “a world free from landmines and unexploded ordnance.”²²

2.1. A brief history of humanitarian mine action

The first humanitarian demining mission, entitled “Operation Salam”, began in 1989 in Afghanistan to protect civilians and displaced persons from the threat of mines left-over from Russia’s military occupation (1979-1989). Despite considerable failures in training and logistical direction given to the deminers, who suffered unacceptably high casualty rates, the “ambitious” UN demining programme was significant because it was “carried-out entirely for the benefit of the local population, not for military expediency”.²³ Following the end of the First Gulf War in 1991, the mine-clearance of Kuwait attracted significantly more funding and achieved its objectives within four years. However, 84 deminers were killed and over 200 injured. Contrary to the attitudes of most military demining contingents at the time, such casualty rates were deemed unacceptable for civilian contractors and provided the catalyst for major institutional change in safety standards and procedures for humanitarian demining.²⁴

The GICHD notes that the fundamental flaws of these early demining operations were that they

had not integrated the other essential components of what is now called the five pillars of mine action; namely, mine risk education, survey, victim assistance, stockpile reduction, and other practical issues (predominantly relating to a lack of technical expertise and training on the different types of mines being used, as well as adequate safety equipment and insurance).²⁵ It equally became clear during these early attempts at humanitarian demining that military techniques and equipment were generally unsuitable. Humanitarian mine action would need to develop into its own specialised field.

Over the course of subsequent operations in Cambodia, Mozambique, and Angola in the early 1990s, humanitarian demining further distinguished itself from its military counterpart. Most militaries had practically abandoned hand-held equipment in favour of mechanical and explosive solutions. In addition to misconceptions and stereotypes about minefields reminiscent of those left-over from the Second World War, this trend in military demining techniques had initially led to misguided funding, research, and development of mechanised demining equipment that simply did not translate to the purpose and standards of humanitarian demining. Following a greater synthesis between the scientific engineering community and the needs of humanitarian deminers, innovation in purpose-built, context-specific machinery has greatly assisted humanitarian demining operations around the world.²⁶ However, hand-held equipment remains essential in humanitarian clearance operations, as most machines are currently ineffective across complex terrains or urban environments.

Towards the end of the 1990s it became clear that a central coordinating body would be necessary to standardise humanitarian demining operations, techniques, and best practices, leading to the creation of UNMAS in 1997 followed by the GICHD in 1998. Both institutions provide a focal point for regulating mine practices and connecting various organisations engaged in humanitarian demining, as well as facilitating and promoting humanitarian mine action research, education, and training. A significant practical milestone was the adoption of the International Mine Action

22. UN Inter-Agency Coordination Group on Mine Action, The Strategy of the United Nations on Mine Action 2013-2018 (2012), https://mineaction.org/sites/default/files/documents/mine_action_strategy.pdf.

23. GICHD, Mine Action: Lessons and Challenges, Geneva (November 2005), https://www.gichd.org/fileadmin/GICHD-resources/rec-documents/Mine_Action_Lessons_Nov2005.pdf, p. 21.

24. Ibid, p. 22.

25. Ibid, pp. 22-25.

26. Ibid, pp. 28-29.

Standards (IMAS) for humanitarian demining to define universal standards for each component of mine action across the five pillars, which, although comprehensive, allows for necessary adaptation to the specific needs of demining operations.²⁷

Both institutions promote the five pillars of humanitarian mine action and are therefore involved in advocating States to sign the Anti-personnel Mine Ban Treaty. The GICHD also contributed to a 2006 project by Geneva Call in which it was reported that 35 non-State armed groups had banned anti-personnel mines, 31 of which had signed the Deed of Commitment and a further 14 of which had “allegedly introduced some type of limitations (temporal or applied) to their mine use”.²⁸

Finally, it is necessary to consider the role of gender in achieving the five pillars of mine action. The impact of mines was initially considered gender-neutral and humanitarian demining operations were perceived as a task reserved for men. More recently, it has been realised that women, men, girls and boys are impacted by landmine contamination in different ways,²⁹ and that it could be beneficial to mainstream gender diversity and involve women in humanitarian mine action.³⁰ Women have increasingly become essential at several levels of humanitarian mine action,

including demining in the field, risk education, victim assistance, and advocacy. Beyond providing a means of employment and income, the technical, physical, and potentially dangerous characteristics of humanitarian demining has the potential to empower women in various ways and shift the understanding of their capabilities and place in the community.³¹

Humanitarian demining, as one of the five pillars of humanitarian mine action, is therefore a distinct field with the following rules, standards, and definitional boundaries:

Humanitarian demining aims for the complete removal of mines so as to allow civilians to return to daily life (also known as “mine clearance”).

Deminer casualties are not accepted and IMAS safety procedures must be adhered to at all times.

Humanitarian demining operations cannot be seen as an engagement in the hostilities.

Humanitarian demining must serve a humanitarian purpose.

2.2. Humanitarian demining equipment

Any equipment that is suited to the purpose of achieving the objectives, standards, and purpose of humanitarian demining can be classified as humanitarian demining equipment. In a post-conflict setting, there are likely to be fewer restrictions on the types of equipment used in humanitarian demining operations. Purpose-built machines, explosives, and robotics could perceivably be included with the consent of the territorial authority in addition to the variety of hand-held devices more commonly used in humanitarian demining. However, where humanitarian demining is taking place during armed conflict, greater limitations apply to ensure that the removal of mines does not amount to an engagement in hostilities. Equipment that could more easily be misused for a military purpose, such as heavy machinery or explosives, is unlikely

27. *Ibid.*, p. 33. The Information Management System for Mine Action (IMSAM) was created in 1999 to keep pace with the new generation of mine action programmes. At the request of UNMAS, the system was developed for the GICHD to help programmes coordinate, prioritise and execute their mine action activities.

28. Geneva Call & Program for the Study of International Organisations, *Armed Non-State Actors and Landmines - Volume II: a global report of NSA mine action*, Geneva (November 2006), <http://www.ruig-gian.org/ressources/reusse-gc-ansal-nov06.pdf?ID=133&FILE=/ressources/reusse-gc-ansal-nov06.pdf>, (hereafter Geneva Call 2006 Report) p. 130. For a useful summary of the report’s main findings, see: Anki SJÖBERG, “Armed Non-state Actors: Their Contribution to Solving the Landmine Problem”, *Journal of Mine Action*, Vol. 11, Issue 1, article 25 (2007), <https://commons.lib.jmu.edu/cisr-journal/vol11/iss1/25>.

29. Swiss Campaign to Ban Landmines, *Gender and Landmines: from Concept to Practice*, Geneva (2008), 108 p. http://www.gmap.ch/fileadmin/Gender_and_Landmines_from_Concept_to_Practice/SCBL_-_Gender__Landmines_2008_rev_Sep09.pdf, pp. 6-7.

30. The Inter-Agency Coordination Group on Mine Action (IACG-MA) has developed guidelines to integrate gender considerations into mine action programmes in 2005. These were reedited in 2010 and most recently in 2019: *United Nations Gender Guidelines for Mine Action Programmes*, 3rd edition, (2019), <https://mineaction.org/en/united-nations-gender-guidelines-mine-action-programmes-0>

31. Franziska EHLERT, Zeila LAULETTA, Nelly SCHLAFEREIT, “Women in Humanitarian Mine Action: Assessing Agency in Families and Communities”, *Applied Research Seminar Final Report*, Graduate Institute of International and Development Studies, Geneva (2016), <http://www.gmap.ch/wp-content/uploads/2016/07/final-report-ARS-2016.pdf>.

to pass checkpoints and could be legitimately removed from humanitarian convoys.

Humanitarian demining during armed conflict is limited to areas away from the conduct of hostilities, and this is reflected in the type of equipment used. Humanitarian demining does not use electronic counter measure, fully remote procedures, or security cordons to overcome mines with active command or timed detonation. Rather, sufficient time must be given to allow active sensors and timers to expire.³² Any remaining mines or IEDs are then considered to be abandoned any may be removed using humanitarian demining equipment and techniques.³³ Both the location and equipment used in humanitarian demining are essential factors in ensuring that the operation is not interpreted as an engagement in the hostilities.

Contrary to the popular conception that demining equipment is readily available for humanitarian demining, the GICHD notes that organisations are often unable to acquire the necessary equipment for the task due to a lack of resources or other obstacles hampering effective delivery.³⁴ It is therefore essential for impartial humanitarian organisations to understand the practical restrictions on humanitarian demining equipment during an armed conflict so that they are able to provide this necessary humanitarian service without having the equipment confiscated or misused. Preliminary research must be conducted to ensure that the demining equipment is appropriate for the particular circumstances and the recipients must receive the necessary training if the equipment is unfamiliar.³⁵

Humanitarian demining equipment is all non-military equipment that is used to demine civilian-populated areas in compliance with the above requirements of humanitarian demining.

During an armed conflict, particular care must be taken to ensure that the equipment used for humanitarian demining does not provide a definite military advantage to a party to the conflict. Heavy machinery and explosive devices are unlikely to be accepted as humanitarian while the conflict is ongoing due to the ease with which they could be misused for a military purpose.

32. Craig MCINALLY and Hans RISSER (Norwegian People's Aid) "Humanitarian Mine Action and IEDs", *Journal of Conventional Weapons Destruction*, Vol. 21, Issue 3 (November 2017), pp. 30-34, <https://commons.lib.jmu.edu/cgi/viewcontent.cgi?article=2802&context=cisr-journal>, p. 3.

33. *Ibid.*

34. GICHD, *Mine Action: Lessons and Challenges* (2005), *op. cit.*, pp. 34-35.

35. *Ibid.*

3. WHO HAS THE PRIMARY RESPONSIBILITY TO CONDUCT HUMANITARIAN DEMINING?

This Section argues that both States and non-State territorial authorities are under an obligation to conduct humanitarian demining in situations where it is necessary to meet the needs of the civilian population under their territorial control. Where an affected State or non-State armed group is unable to fulfil this obligation, it is proposed that they are required to cooperate internationally and not arbitrarily refuse offers of humanitarian assistance, including offers of humanitarian demining assistance. The scope of this obligation is discussed in Sections 5 and 6.

Under general international law, States have the primary responsibility to meet the needs of persons within their territory or under their effective control. This obligation is an essential component of State sovereignty, as expressed in Article 2(4) of the UN Charter, and is reflected in individual State practice, multilateral treaty obligations, and several UN instruments and Resolutions.³⁶ Under the law of Occupation, IHL requires the Occupying State to provide the civilian population under its control with food, medical supplies, and other services essential for their survival.³⁷ The relevant treaty instruments strongly imply that this obligation applies to a State's own civilian population at all times.³⁸ Under IHRL, the obligation to meet the needs of persons under the effective control of the State is the very *raison d'être* of this body of law and is reflected in each of its core principles and rules.

There is debate on the extent to which these obligations apply to non-State armed groups. Non-State armed groups are clearly bound by the obligation of humane treatment under Common Article 3 and, where applicable, article 4(2) of AP II. The ICRC has argued that “the way in which non-State armed groups exercise control over, and interact with, persons living in territory under their de facto control is inherently linked to the conflict in question” and that therefore IHL applies and “protects persons living in territory under the de facto control of non-State armed groups”.³⁹ Moreover, the ICRC's updated Commentary to Common Article 3, applicable to both State and non-State armed groups, states that refusing humanitarian assistance in situations where the civilian population does not have their essential needs provided for will be deemed arbitrary and unlawful.⁴⁰ Accordingly, States and, where applicable, non-State armed groups must therefore either fulfil the essential needs of the civilian population or cooperate with international organisations offering assistance. The obligation to allow and facilitate unimpeded humanitarian access to persons in need is applicable to non-State armed groups under customary IHL.⁴¹ With respect to IHRL obligations, there remains debate on their applicability to non-State armed groups. However, both the UN and ICRC have adopted the position that non-State armed groups incur IHRL responsibilities where they exercise effective territorial control.⁴² Accordingly, it is reasonable to conclude that both States and non-State

36. UNGA Resolution 46/182, Strengthening of the Coordination of humanitarian emergency assistance of the United Nations, A/RES/46/182 (19 December 1991), <https://undocs.org/en/A/RES/46/182>; UNHCR, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2 (11 Feb 1998), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/104/93/PDF/G9810493.pdf?OpenElement>, para. 4 and Principles 3(1) and 25(1); Swiss Federal Department of Foreign Affairs (Swiss FDFA) – Directorate of International Law, Humanitarian access in situations of armed conflict: handbook on the normative framework, Version 1.0, Bern (2011), <https://www.alnap.org/system/files/content/resource/files/main/humanitarian-access-in-situations-of-armed-conflict-handbook-on-the-normative-framework-en.pdf>, (hereafter Swiss FDFA Handbook) p. 12; Dapo AKANDE and Emanuela-Chiara GILLARD, Oxford Guidance on the law relating to humanitarian relief operations in situations of armed conflict, commissioned by UNOCHA (2016), <https://www.unocha.org/sites/dms/Documents/Oxford%20Guidance%20pdf.pdf>, (hereafter Oxford Guidance), para. 10.

37. Arts. 55 of GCIV and 69 of API.

38. Oxford Guidance, pp. 12-14.

39. ICRC 2019 Report p. 53.

40. ICRC, 2017 Commentary on Common Article 3, para 862.

41. See the Practice section related to Rule 55 of the ICRC Study on Customary IHL, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule55.

42. UNOHCHR, International Legal Protection of Human Rights in Armed Conflict, Geneva and New-York (2011), https://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf, pp. 23-27; Annyssa BELLAL, “Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council”, Academy in-Brief 7, Geneva Academy (December 2016), https://www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf, pp. 18-30; ICRC 2019 Report, pp. 52-54; The responsibility for the realisation of certain human rights can extend to “all members of society”, see CESCR, General Comment 14, Art. 12: the right to the highest attainable standard of health, E/C.12/2000/4 (11 August 2000), <https://undocs.org/en/E/C.12/2000/4>, para. 42.

armed groups are under an obligation to meet the essential needs of the civilian populations under their control.

Does this obligation include humanitarian demining? Firstly, as demonstrated below, abandoned anti-personnel mines indiscriminately effect the civilian population and prevent the delivery of essential humanitarian aid, including food, shelter, and medical supplies. In these situations, humanitarian demining is “essential to the survival of the civilian population” and therefore triggers the obligation of the State or territorial authority to fulfil this need under IHL. Secondly, abandoned anti-personnel mines directly threaten, *inter alia*, the right to life, health, and the rights of the child, thereby triggering the obligation of the State or territorial authority to facilitate humanitarian demining under IHL. Each of these obligations shall be considered in turn.

3.1 The obligation to meet the needs of the civilian population under IHL and its applicability to humanitarian demining

In order to demonstrate that States and non-State armed groups are obliged to facilitate humanitarian demining under IHL, it is necessary to show that humanitarian demining is essential to the survival of the civilian population. This link is demonstrated by reference to the fact that abandoned anti-personnel mines indiscriminately effect the civilian population and prevent the delivery of essential humanitarian aid.

3.1.1 The origin and scope of “supplies essential for the survival of the civilian population”

The concept of supplies “essential for the survival of the civilian population” derives from the law of Occupation in Articles 55 of GC IV and 69 of AP I, and the law triggering the right to offer humanitarian assistance in Articles 70(1) of AP I and 18(2) of AP II.

Article 55 of GC IV states that the **Occupying Power** has the duty “to the fullest extent of the means available to it ... of ensuring the food and medical supplies of the population”. Article 69 of AP I provides that, in addition, the Occupying Power must “ensure the provision of clothing, bedding,

means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship”. Article 70(1) of API states that where the Occupying power has failed to fulfil this obligation, humanitarian assistance shall be provided by impartial humanitarian organisations. As noted by Dapo Akande and Emanuela-Chiara Gillard, the fact that States thought it was unnecessary to be reminded of their obligation to maintain their own civilian population during an armed conflict is a clear recognition of the existence of such an obligation.⁴³ Furthermore, the obligation to provide humane treatment to protected persons under Article 27 of GC IV has been interpreted to mean that States are obliged to provide such persons with the basic means for ensuring their survival.⁴⁴

Under the law applicable to NIAC, the obligation of humane treatment is reflected in Common Article 3 and Article 4(1) of AP II and may equally be relied upon to demonstrate that States and non-State armed groups are obliged to meet the needs of the civilian population under their effective control.⁴⁵ This interpretation is strengthened by the fact that, under Article 18(2) of AP II, impartial humanitarian assistance shall be undertaken, subject to the consent of the affected State, where the civilian population is inadequately provided with supplies essential for its survival.⁴⁶ The Guiding Principles on the Right to Humanitarian Assistance similarly states that the right to humanitarian assistance may be invoked where “the essential humanitarian needs of human beings in an emergency are not being met, so that the abandonment of victims without assistance would constitute a threat to human life or a grave offence to human

⁴³Oxford Guidance, para. 13.

⁴⁴Ibid, paras. 13-14.

⁴⁵Oxford Guidance, paras. 14-15 ; ICTY Trial Chamber, Prosecutor v. Delalic, IT-96-21-T (16 November 1998) https://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf, para. 543; Swiss FDFA Handbook, p. 26; ICRC, Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2nd edition (2016), <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>, (hereafter Commentary of 2016) para. 826: “While the Parties to the conflict are primarily responsible for addressing humanitarian needs, the purpose of this paragraph is to allow impartial humanitarian organisations to supplement the Parties where the latter do not meet their obligations in this regard”.

⁴⁶Article 18(2) of AP II.

dignity”.⁴⁷ The ICRC Study on Customary IHL has concluded that the obligation to allow and facilitate humanitarian assistance to civilians in need is applicable in both international and non-international armed conflicts.⁴⁸

It may therefore be concluded that IHL obliges both States and non-State armed groups to provide the civilian population under their effective control with objects and services essential for their survival. It is well-accepted that such objects include food, water, clothing, shelter, medical supplies,⁴⁹ and potentially secondary networks such as electricity and communication systems.⁵⁰ These humanitarian objects are civilian objects and are therefore protected from attack.⁵¹ However, the phrase “other supplies essential for the survival of the civilian population” or “objects indispensable to the survival of the civilian population” is deliberately non-exhaustive and is understood to include any items that are strictly necessary to achieve this purpose.⁵² Examples have included foodstuffs, agricultural areas, crops, livestock, drinking water installations, and irrigation works.⁵³ Principle 9 of the Guiding Principles on the right to humanitarian assistance indicates that humanitarian assistance may consist of any material indispensable to the survival of victims.⁵⁴ The determination of which objects are essential and whether the civilian population in inadequately supplied is therefore

a case by case assessment.⁵⁵ As demonstrated below, humanitarian demining operations and equipment are essential to the survival of affected civilian communities in armed conflict and should therefore be included within the scope of this legal concept.

3.1.2 Classifying humanitarian demining as essential to the survival of the civilian population

Mines disproportionately affect the civilian population. Between 2015 and 2018, Landmine Monitor recorded 30,560 casualties (defined as death or serious injury) resulting from landmines. Civilians accounted for approximately 80 percent of all victims.⁵⁶ The ICRC estimates that two thousand individuals, three-quarters of whom are civilians, are injured or killed each month. According to UNICEF, one million individuals have been victims of mines since 1975, one-third of whom are children under the age of fifteen.⁵⁷ There are approximately 110 million active mines across 70 countries that directly threaten the life and bodily integrity of civilian populations worldwide in both conflict and post-conflict environments. Significantly, the presence of abandoned anti-personnel mines in densely populated civilian areas is preventing impartial humanitarian organisations or other relevant actors from delivering humanitarian aid essential for the survival of the civilian population, such as food, water, shelter, and medical supplies. The UN General Assembly and Security Council have repeatedly called upon States and/or parties to the conflict to facilitate humanitarian demining in order to enable humanitarian access to affected communities. Bearing in mind that parties to the conflict are under an obligation to meet the essential needs of the civilian population under their control, it is also recalled that denying humanitarian access can amount to a violation of IHL and attract individual criminal responsibility under ICL.

47. International Institute of Humanitarian Law, *Guiding Principles on the Right to Humanitarian Assistance*, San Remo (April 1993), https://www.peacepalace.library.nl/ebooks/files/IIHL4_en.pdf.

48. Rule 55.

49. ICRC, *Commentary on the First Additional Protocol: Protocol (I) relating to the Protection of Victims of International Armed Conflicts* (1987), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument>, (hereafter *Commentary of 1987*) p. 655, paras. 2103-2106; Knut DORMANN, “Preparatory Commission for the International Criminal Court: The Elements of War Crimes – Part II: Other Serious Violations of the Laws and Customs Applicable in International and Non-International Armed Conflicts”, *International Review of the Red Cross*, Vol. 83, No. 842 (2001), https://www.icrc.org/en/doc/assets/files/other/461-488_dormann.pdf, pp. 461, 475-476.

50. Nathalie DURHIN, “Protecting civilians in urban areas: A military perspective on the application of international humanitarian law”, *International Review of the Red Cross*, Vol. 98, No. 901 (2016), pp. 177-199, https://international-review.icrc.org/sites/default/files/irc_97_901-11.pdf, pp. 177, 180.

51. Rule 32 of the ICRC Study on Customary IHL.

52. See footnote 49 above.

53. ICRC, “Objects indispensable to the survival of the civilian population”, *How does Law protect in War*, <https://casebook.icrc.org/>; See also Art. 69 AP I and ICRC, *Commentary of 1987*, para. 2780.

54. See footnote 47 above.

55. Oxford Guidance, para. 19; Art. 70 AP I and ICRC, *Commentary of 1987*, para. 2794.

56. Landmine Monitor 2019 Report, p. 54.

57. See “Mines”, MSF 2013 Practical Guide.

Accordingly, it is proposed that humanitarian demining operations and equipment are essential to the survival of the civilian population for the following reasons:

- a. They are an essential means of saving civilian life from the indiscriminate effect of mines in situations where civilians have no choice or practical alternative than to live with the threat of abandoned anti-personnel mines on a daily basis; and
- b. They are an essential pre-requisite to the delivery of the traditional forms of humanitarian assistance, such as food and medical supplies, as relief organisations are unable to obtain access where the threat posed by abandoned anti-personnel mines is too high.

Both of these functions of humanitarian demining are recognised in the practice of the UN and are supported by States, as summarised below. In recognising that parties to the armed conflict exercising territorial control have the primary responsibility to conduct humanitarian demining, it is logical to accept that humanitarian demining operations and equipment are indispensable to the survival of the civilian population and therefore fall within the obligation to fulfil this need under IHL.

3.1.2.1 Practice of the UN General Assembly

The UN General Assembly has consistently called on States to address the threat that mines pose to the civilian population. Following a series of consecutive Resolutions on “Assistance in Mine Clearance”,⁵⁸ the General Assembly unanimously adopted Resolution 53/26 (1998) on Assistance in Mine Action,⁵⁹ in which it affirms “its deep concern at the tremendous humanitarian problem caused by the presence of mines and other unexploded devices that have serious and lasting social and economic consequences for the populations of mine-infested countries and constitute an obstacle to the return of refugees and other displaced persons, to humanitarian aid operations and to reconstruction and economic development, as well as to the restoration of normal social conditions”.⁶⁰

58. UNGA Resolutions 48/7 (1993); 49/215 (1994); 50/82 (1995); 51/149 (1996) and 52/173 (1997).

59. UNGA Resolution 53/26, Assistance in Mine Action, A/RES/53/26 (31 December 1998), <https://undocs.org/en/A/RES/53/26>.

60. Ibid.

This sentiment is reflected in each subsequent Resolution on Assistance in Mine Action and on the implementation of the Anti-Personnel Mine Ban Treaty.⁶¹ In Resolution 74/80 (2019), the Assembly reaffirms that mine action is an “important and integrated component of the United Nations humanitarian assistance and development activities”,⁶² and notes with satisfaction “the growing inclusion of mine action in humanitarian appeals”.⁶³ Resolution 70/80 (2015) further calls upon States to provide humanitarian demining assistance and technical expertise,⁶⁴ and encourages all relevant multilateral, regional, and national programmes to include mine action in their humanitarian assistance activities.⁶⁵

In response to Resolution 70/80 (2015) on Assistance in Mine Action, the Report of the Secretary General confirms the disproportionate impact of mines on civilian populations and expresses particular concern over the rise in IEDs, which it labels as indiscriminate weapons.⁶⁶ Based on the 18 countries that provide data to the UN, there was a 40 percent increase in casualties from mines in 2016 compared to 2015, while Landmine Monitor recorded a 75 percent increase in casualties between 2014 and 2015. Although deaths from ERW more than quadrupled during this period due to active conflict in complex environments,⁶⁷ the use of IEDs is largely responsible for this upward trend.⁶⁸ In its 2019 Report, Land Mine Monitor reported that IEDs accounted for 77.5 percent of all mine-related casualties in 2018.⁶⁹ The total number of civilian casualties spiked in 2016 at 9,439 persons (the highest since 1999). Civilians comprise approximately 80 percent of all casualties over the last few years,⁷⁰ confirming the indiscriminate and

61. UNGA Resolutions 53/26 (1998); 54/191 (1999); 55/120 (2000); 56/219 (2001); 57/159 (2002); 58/127 (2003); 60/97 (2005); 61/84 (2006); 62/99 (2007); 63/42 (2008); 64/84 (2009); 65/48 (2010); 66/69 (2011); 67/32 (2012); 68/72 (2013); 69/34 (2014); 70/80 (2015); 71/34 (2016); 72/53 (2017); 73/62 (2018); 74/80 (2019).

62. UNGA Resolution 74/80 (2019).

63. Ibid, Preamble, p. 2.

64. UNGA Resolution 70/80, para. 3.

65. Ibid, para. 7.

66. UNSC, Comprehensive Approach to Mine Action - Report of the UN Secretary General, S/2018/623 (21 June 2018), <https://undocs.org/S/2018/623>, (hereafter UNSG 2018 Report), para. 53.

67. Ibid, para. 4.

68. Ibid, para. 5.

69. Landmine Monitor 2019 Report, p. 59.

70. Ibid, p. 58 (In 2018, 71 percent of casualties were civilian; down from 87 percent in 2017 and 78 percent in 2016).

disproportionate effects of anti-personnel mines and IEDs.

The Report of the Secretary General equally stresses that humanitarian mine action is “critical to the protection of civilians through the provision of immediate life-saving risk education and clearance activities that limit harm to civilians, enable humanitarian operations and facilitate the return of displaced populations”.⁷¹ Despite the ongoing humanitarian catastrophe caused by the presence of mines and unexploded remnants of war, notes that “[i]n the first six months of 2016 alone, over 163 sq km of land potentially contaminated with landmines and 22 sq km potentially contaminated with explosive remnants of war were rendered safe through mine action, across the 25 countries and territories where data was available”.⁷² Recognising the importance of clearing mines from essential infrastructure and facilities, the Report states: “Among those 25 countries and territories, the percentage of affected hospitals cleared of landmine and explosive remnant of war contamination increased from 50 per cent in 2014 to 93 per cent at the end of 2016. Furthermore, 89 per cent of affected educational facilities and 70 per cent of affected markets were rendered safe by the end of 2016”. The Report highlights that these achievements are “particularly impressive” given the increase in mine-affected infrastructure during the same period in which “hospitals reported to be affected rose from 8 to 169 between 2014 and 2016, and markets reported to be affected rose from 31 to 670”.⁷³

Below is a summary of Secretary General’s Report on reducing the threat and socioeconomic impact of mines by country:

- In Afghanistan, 97 sq km of potentially dangerous land was rendered safe as a result of mine action operations, benefitting almost 170,000 individuals in affected communities.⁷⁴
- In Darfur, 315 villages were assessed, destroying over 12,000 ERW and delivering mine risk education to more than 360,000 individuals in the reporting period, facilitating the return of approximately 12,000 internally displaced persons.⁷⁵
- In the Democratic Republic of the Congo, approximately 70 landmines and more than 50,000 other ERW were destroyed, allowing local communities to access their land and contributing to their socio-economic development.⁷⁶
- In Iraq, key infrastructure was rendered safe through mine action, including highways and bridges, water stations and sewage plants, health and education facilities, allowing civilians to return home and enabling the safe delivery of humanitarian assistance.⁷⁷
- In Libya, despite operational difficulties resulting from ongoing the armed conflict, the UN was able to coordinate risk education, survey, and clearance activities and provide technical advice to national authorities. In Sirte, clearance of Bin Sena Hospital enabled the facility to regain full operational capability and clearance along 200 km of gas pipeline re-established access to a vital energy source.⁷⁸
- In South Sudan, the United Nations rendered more than 3,200 suspected hazardous areas safe, destroying 1,245 anti-personnel mines, 300 anti-tank mines and almost 50,000 ERW, and enabling access to 270 schools, 40 medical facilities, and 225 water points and boreholes.⁷⁹
- In Syria, in line with UNSC Resolution 2332, UNMAS carries out activities remotely through partners; a Mine Action Sub-Cluster has been established, common practices have been developed amongst an increasing number of partners and mine action has been integrated into the wider humanitarian response.⁸⁰

71. UNGA, Assistance in mine action - Report of the Secretary General, A/72/50 (31 July 2017), http://www.globalprotectioncluster.org/_assets/files/tools_and_guidance/mine_action/20170725_report-of-the-sg-on-assistance-in-mine-action_approved-by-eosg.en.pdf, (hereafter UNSG 2017 Report), para. 12.

72. UNSG 2017 Report, para. 34.

73. Ibid, para. 35.

74. Ibid, para. 37.

75. Ibid, para. 41.

76. Ibid, para. 42.

77. Ibid, para. 44.

78. Ibid, para. 45.

79. Ibid, para. 47.

80. Ibid, para. 49.

The practice of States in unanimously adopting consecutive UN General Assembly Resolutions on humanitarian mine action is a recognition of their obligation to meet the needs of the civilian population by removing the direct threat posed by mines and by facilitating the delivery of humanitarian assistance to affected communities. As demonstrated by both the devastating impact of mines and the response of UNMAS, humanitarian demining operations and equipment are necessary to fulfil this obligation and are therefore essential to the survival of civilian populations affected by abandoned anti-personnel mines.

3.1.2.2 Practice of the UN Security Council

In its first stand-alone Resolution on mine action, the UN Security Council also recognised the disproportionate impact of mines on the civilian population. Adopted by a unanimous vote in 2017, the Resolution expressed “deep concern about the number of civilians, including children, killed or maimed by landmines, explosive remnants of war and improvised explosive devices, in conflict and post conflict situation”.⁸¹ The Resolution called upon all parties to armed conflicts to “end immediately and definitively any indiscriminate use of explosive devices in violation of international humanitarian law”, as well as to take steps to protect civilian population from the threat through education, rehabilitation and other measures.⁸² Significantly, the Resolution “[s]tresses the importance of considering mine action during the earliest stages of planning and programming in peacekeeping operations and special political missions, where appropriate, as well as humanitarian emergency responses”.⁸³

Similar sentiments were echoed in the Report of the Secretary General on the implementation of the Security Council’s Resolution on Mine Action:

Landmines, explosive remnants of war and improvised explosive devices are a deadly threat that persists long after conflict has ended and disproportionately affects civilians. Indiscriminate, these weapons do

*not distinguish between the boot of a soldier and the foot of a child. The disadvantage and suffering that they cause must never be underestimated.*⁸⁴

Case Study

Humanitarian demining is essential for the survival of the civilian population in Syria

The complex and protracted armed conflict in Syria illustrates the extent of the humanitarian impact of mines. Agnès Marcaillou, Director of the United Nations Mine Action Service (UNMAS) on the situation in the Middle East, reported to the Security Council that there are approximately 184 explosive incidents per day in the region, affecting 11.5 million people across 2,563 communities.⁸⁵ The data shows that “for each known explosive accident, an average of 1.5 people are killed and two people are physically injured, with approximately one in three survivors suffering the amputation of at least one limb”.⁸⁶ The presence of mines and IEDs is affecting agriculture, roads, critical civilian infrastructures, schools, health centres, water supply, and electricity plants, impeding humanitarian access, and worsening the socioeconomic crisis facing the civilian population. Ms. Marcaillou stated that the impact is “immediate and devastating”, adding that “[i]n Syria, mine action is considered by all stakeholders to be an immediate and essential requirement to respond adequately to humanitarian needs in the country”.⁸⁷ Ms Marcaillou specified that UNMAS activities are predicated on “strict adherence to the humanitarian principles of impartiality, neutrality, independence and humanity”.⁸⁸

A few States at the Security Council meeting made noteworthy responses to Ms Marcaillou’s Report on UNMAS activities in Syria.

- The United Kingdom recorded its expectation

81. UNSC Resolution 2365 (2017), Preamble, p. 1, lit. 6.

82. Ibid, paras. 2 and 3.

83. Ibid, para. 10 (emphasis added).

84. UNSG 2018 Report, para. 53.

85. UNSC, 8645th Meeting, The Situation in the Middle East, S/Pv.8645 (24 October 2019), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_8645.pdf, pp. 6-8.

86. Ibid, p. 6.

87. Ibid, p. 6.

88. Ibid, p. 8.

that the regime in Syria fully cooperates with UNMAS and allows access.⁸⁹

- Russia “urge[d] all countries that are genuinely concerned about Syria’s humanitarian welfare to join these and other humanitarian efforts, and to deliver humanitarian assistance to all Syrians without discrimination, politicization or preconditions”.⁹⁰
- Syria emphasised its position that demining is a humanitarian, non-political activity.⁹¹

The UN Secretary General confirmed that mine action is recognised as an “integral part of the humanitarian emergency response in the Syrian Arab Republic, where an estimated 8.2 million people live in areas affected by explosives incidents and 13.1 million need humanitarian aid”,⁹² noting that effective mine action is impeded by the presence of explosive ordnance.⁹³ A 2019 Report of the Secretary General on the implementation of UNSC Resolutions in Syria notes that access was limited in Raqqah city and east of the Euphrates River in Dayr al-Zawr, including the Hajin enclave, due to the presence of explosive hazard contamination,⁹⁴ and states that “[a]ll parties must cease any indiscriminate attacks carried out through air strikes, shelling and the use of improvised explosive devices”.⁹⁵

The UN Security Council has issued several Resolutions on situation in Syria relevant to establishing the necessity of humanitarian demining:

- UNSC Resolution 2139 (2014) on the situation in Syria took the unprecedented step of demanding uninhibited, cross-border access of humanitarian relief organisation into Syria,⁹⁶ and was renewed and affirmed in each

subsequent Resolution on the situation in the Middle-East until January 2020.⁹⁷

- UNSC Resolutions 2401 (2018) and 2449 (2018) not only reaffirm the obligation to facilitate humanitarian access, they specifically call for “humanitarian mine action to be accelerated as a matter of urgency throughout Syria”.⁹⁸
- On 10 January 2020, the UNSC renewed only two of the four cross-border points and reduced the duration of the renewal to six months instead of 12.⁹⁹

The sheer devastation caused by abandoned anti-personnel mines in Syria, the inability for relief organisations to access civilian populations in need due to the presence of mines, and the response of the international community through the UN, demonstrate that humanitarian demining is essential to the survival of the civilian population in Syria.

UNSC Resolutions have repeatedly called upon parties to the conflict to facilitate humanitarian demining in order to protect civilian populations from the threat of abandoned anti-personnel mines and to enable the delivery of other forms of humanitarian assistance, while noting that States bear the primary responsibility. This practice, in addition to that of the General Assembly, recognises that humanitarian demining is essential to the survival of the civilian population. In Resolution 1261 (1999), the UNSC drew a direct link between humanitarian demining and humanitarian assistance, reaffirming its readiness in armed conflict to “continue to support civilian populations in distress, taking into account the particular needs of children, including ... child-focused mine clearance and mine awareness programmes”.¹⁰⁰

89. Ibid, p. 20.

90. Ibid, p. 12.

91. Ibid, p. 25.

92. UNSG 2018 Report, para. 46.

93. Ibid, para. 7.

94. UNSC, Implementation of Security Council resolutions 2139 (2014), 2165 (2014), 2191 (2014), 2258 (2015), 2332 (2016), 2393 (2017), 2401 (2018) and 2449 (2018) – Report of the Secretary General, S/2019/820 (15 October 2019), <https://undocs.org/en/S/2019/820>, (hereafter UNSG 2019 Report), paras. 7, 33.

95. Ibid, para. 42.

96. UNSC Resolution 2139, S/RES/2139 (22 February 2014).

97. UNSC Resolution 2165, S/RES/2165 (14 July 2014); UNSC Resolution 2191, S/RES/2191 (17 December 2014); UNSC Resolution 2258 (22 December 2015); UNSC Resolution 2332, S/RES/2332 (21 December 2016); UNSC Resolution 2393, S/RES/2393 (19 December 2017); UNSC Resolution 2401, S/RES/2401 (24 February 2018); UNSC Resolution 2449, S/RES/2449 (13 December 2018).

98. UNSC Resolution 2401 (2018), para. 11.

99. UNSC Resolution 2504, S/RES/2504 (10 January 2020), para 3. See also: UN News, “Security Council beats midnight deadline, renews Syria cross-border aid in contentious vote” (10 January 2020), <https://news.un.org/en/story/2020/01/1055181>.

100. UNSC Resolution 1261 (30 August 1999).

3.1.3 IHL rules and treaty obligations related to humanitarian demining

As demonstrated above, the primary responsibility of States to conduct humanitarian demining is contained within the obligation to meet the essential needs of the civilian population under its control. The following IHL rules and treaty provisions related to humanitarian demining strengthen this interpretation.

- Under customary IHL, the party to a conflict that disseminated the mines is legally obliged to facilitate the demining process once the conflict has come to an end.¹⁰¹
- Where a peace agreement is reached between the parties to a conflict, each party must exchange maps indicating where mines are located and must transmit these to the Secretary General of the UN.¹⁰²
- Each party to a conflict may request technical and material assistance from other States and international organisations in their post-conflict demining operations.¹⁰³
- The 164 States party to the Mine Ban Treaty are under an obligation to “provide assistance for mine clearance and related activities” where they are “in a position to do so”.¹⁰⁴
- It is expressly prohibited to engage prisoners of war in demining activities.¹⁰⁵

3.1.4 Specific considerations when applying the obligation to non-State armed groups

Although it is reasonable to conclude that non-State armed groups are responsible for facilitating humanitarian demining to meet the needs of the civilian population under their effective control, there are several practical obstacles in convincing both the armed group and the affected State of the nature and extent of this obligation. The armed

group may lack the necessary resources to conduct humanitarian demining while simultaneously harbouring a distrust of international cooperation. The State, meanwhile, may object to placing any such responsibility on the armed group for fear of legitimising its claim to Statehood. It should be noted that these factors are also relevant to obtaining the consent of the State or non-State armed group to receive humanitarian demining assistance and will therefore be revisited in Section 6.

In a 2006, Geneva Call, in collaboration with the Program for the Study of International Organisations and the GICHD, produced a global report on “Armed Non-State Actors and Landmines”. The Report “compiles and analyses data on [non-State armed groups] involvement in the five pillars of mine action (mine ban advocacy, stockpile destruction, mine clearance, mine risk education, and victim assistance), including stakeholders’ views on the benefits, difficulties and lessons learned in this regard”.¹⁰⁶ The Report states that, as of 2006, 35 [non-State armed groups] had banned anti-personnel mines, 31 of which had signed the Deed of Commitment, and that a further 14 had “allegedly introduced some type of limitations (temporal or applied) to their mine use”.¹⁰⁷

The Report explains that non-State armed groups can be distrustful or suspicious of demining operations, especially where it concerns mines laid by the group themselves.¹⁰⁸ Meanwhile, hostility from the State against which the armed group is fighting often led that State to obstruct the practical aspects of humanitarian demining cooperation with the non-State armed group, such as blocking visas, travel permits, and other technical or bureaucratic interferences that would delay the delivery of equipment. In some cases, the government of the concerned State halted mine action activities entirely.¹⁰⁹ The Report found that some organisations were able to overcome the lack of trust on behalf of States by working with both parties to the conflict in equal measure, or by convincing the State of the humanitarian benefit of mine action.¹¹⁰

101. Rule 83 of the ICRC Study on Customary IHL.

102. Arts. 9 and 10 of Protocol II to the Weapons Convention (While this treaty position is technically only binding on member States, it is considered customary under Rule 83 of the ICRC Study on Customary IHL).

103. Arts. 9-11 of Protocol II to the Weapons Convention.

104. Art. 6(4) of the Anti-personnel Mine Ban Treaty.

105. Art. 52 of GC III.

106. Geneva Call 2006 Report, Abstract.

107. *Ibid.*, p. 130.

108. *Ibid.*, p. 32-33.

109. *Ibid.*, p. 37.

110. *Ibid.*, p. 42-43.

The Report reiterates that States party to the Anti-personnel Mine Ban Treaty are under an obligation to facilitate humanitarian demining within their territorial jurisdiction. It notes that while a State party could justify its failure to fulfil this obligation in situations where it has lost control of part of its territory to a non-State armed group, the State is “bound to make ‘good faith’ efforts to perform its treaty obligations”.¹¹¹ The Report argues that, under the contemporary state of the law, a non-State armed group may agree to ban anti-personnel landmines to protect the civilian population irrespective of the legal position of the State in which the armed group is controlling territory. The GICHD argues that engagement with non-State armed groups to protect civilian life and facilitate essential humanitarian aid is often necessary even where the consent of the affected State is not forthcoming.

The Report on Mine Action in the Midst of Internal Conflict,¹¹² prepared by Geneva Call as part of a workshop on the International Campaign to Ban Landmines, compiled the following list of considerations for humanitarian organisations undertaking mine action during an ongoing armed conflict:

*The establishment of programs of mine action in situations of ongoing hostilities inevitably presents many difficulties, including: security for mine action staff; questions relating to the utility and cost-effectiveness of the project (in light of possible re-mining of cleared areas); the choice of actor to be placed in charge of the program; the degree of responsibility of the state and whether non-cooperation by a state party to the Mine Ban Treaty may be considered as non-compliance with its treaty obligations; and the political dimension of how cooperation with [a non-State armed group] for purposes of mine action may be construed as granting legitimacy to the [non-State armed group].*¹¹³

111. Ibid, p. 135.

112. Geneva Call & the Non-State Actors Working Group of the International Campaign to Ban Landmines, *Mine Action in the midst of Internal Conflict: A Report on the Workshop Organized by Geneva Call and International Campaign to Ban Landmines Non-State Actor Working Group, Zagreb (27 November 2005)*, <https://reliefweb.int/sites/reliefweb.int/files/resources/C4248247373A3089C125721B004C0F6C-GenevaCall-Nov2005.pdf> (hereafter Geneva Call 2005 Report).

113. Geneva Call 2006 Report, p. 30 (summarizing findings of the Geneva Call 2005 Report).

3.2 The obligation to meet the needs of the civilian population under IHRL and its applicability to humanitarian demining

IHRL applies at all times, including in times of armed conflict where it complements IHL.¹¹⁴ The main human rights treaty-bodies have found that **States** have positive obligations to uphold these human rights and meet the basic needs of the civilian population.¹¹⁵ As for **Non-State Armed Groups**, it is still uncertain whether they bear obligations under IHRL. As mentioned above, the position of the UN Office of the High Commissioner for Human Rights (OHCHR), shared by the ICRC, is that non-State actors may incur human rights responsibilities to the extent that they control territory and exercise government-like functions.¹¹⁶ It is proposed that parties to the armed conflict exercising territorial control are obliged to facilitate humanitarian demining for the same reasons advanced in the previous section; namely, humanitarian demining is essential to the survival of the civilian population by: (a) protecting civilians from the indiscriminate impact of anti-personnel mines; and (b) ensuring the delivery of other forms of essential humanitarian assistance, such as food, water, and medical supplies.

This subsection will look into civil and political rights, economic, social and cultural rights, and the rights of the child, focusing on some of the human rights which can be impacted by the absence of demining operations in mine-contaminated areas. The rights mentioned below must not be viewed in isolation, but in combination with one another.¹¹⁷

114. ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), ICJ Reports 2004, p. 136, <https://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>, para. 106.

115. Oxford Guidance, para. 11.

116. See footnote 42 above.

117. CCPR, General Comment 36, Art. 6: right to life, CCPR/C/GC/36 (2 November 2018), <https://undocs.org/CCPR/C/GC/36>, para. 56; CESCR, General Comment 4, Art.11(1): The right to adequate housing, E/1992/23 (13 December 1991), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4759&Lang=en, para. 9; on the links between civil and political rights and the rights of the child, see Art. 24 ICCPR; CCPR, General Comment 36 (2018), para. 60; CCPR, General Comment No. 17, Art. 24: Rights of the child, CCPR/C/GC/17 (7 April 1989), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6623&Lang=en; on the links between the right to health and the rights of the child, see CESCR, General Comment 14 (2000), para 22.

The section will not delve into regional human rights instruments, which nevertheless may contain relevant additional protection of fundamental rights, and should be examined by practitioners depending on the context in which they are operating. The obligation to meet the needs of the civilian population is related to the provision of humanitarian assistance, as failure to fulfil this obligation triggers both the right of impartial humanitarian organisation to offer such assistance and the right of affected persons to receive it.¹¹⁸ Although most IHRL instruments do not refer to humanitarian assistance,¹¹⁹ it remains regulated by this body of law.¹²⁰ One must analyse the nature of human rights obligations and the content of each relevant human rights, as developed by the main human rights treaty bodies, to interpret whether a ground for humanitarian assistance can be found therein. In either case, it remains the responsibility of the parties to the armed conflict to meet the needs of the civilian populations on their own or through the facilitation of external humanitarian assistance.

3.2.1 Civil and Political Rights

The rights recognised in the ICCPR¹²¹ impose on States an obligation to respect and ensure that individuals subject to their jurisdiction enjoy these rights without discrimination.¹²² According to the Committee on Civil and Political Rights, resulting legal obligations are both negative and positive in nature. The State must not only refrain from violating these fundamental rights, it must also take action to ensure the fulfilment of these rights and protect individuals against violations thereof.¹²³

118. Rule 55 of the ICRC Study on Customary IHL.

119. Swiss FDFA Handbook, pp. 29 ff.

120. Rebecca BARBER, "Facilitating humanitarian assistance in international humanitarian and human rights law", *International Review of the Red Cross*, Vol. 91, No. 874 (June 2009), <https://www.icrc.org/en/doc/assets/files/other/irrc-874-barber.pdf>, pp. 391-396.

121. International Covenant on Civil and Political Rights (New-York, 19 December 1966, in force 23 March 1976), UNTS Vol. 999, p. 171, <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280004bf5> (hereafter ICCPR).

122. The non-discrimination aspect is reminded by the Committee when commenting on several human rights: see CCPR, General Comment 36 (2018), para. 61; CCPR, General Comment 27, Art 12: Freedom of Movement, CCPR/C/21/Rev.1/Add.9 (18 October 1999), <https://undocs.org/CCPR/C/21/Rev.1/Add.9>, para. 18.

123. Art 2(1) ICCPR; CCPR, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13 (29 March 2004), <https://undocs.org/CCPR/C/21/Rev.1/Add.13>, paras. 6-8.

The **right to life** is enshrined in article 6 of the ICCPR. Listed in article 4(2) of the Covenant, this right is part of the core human rights, from which no derogation is permitted even in situations of armed conflict or other public emergencies threatening the life of the nation.¹²⁴ Deprivation of life can be caused by an act or an omission, by the State or by other persons or entities. As stated by the Human Rights Committee: "The obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life",¹²⁵ and "requires States parties to take special measures of protection towards persons in situation of vulnerability whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence".¹²⁶

The right to life is not absolute in the sense that only arbitrary deprivations of life are prohibited. The notion of "arbitrariness" should not be fully equated with that of "unlawfulness", but understood more broadly to include elements of "inappropriateness, injustice, lack of predictability, and due process of law".¹²⁷ The Human Rights Committee specifies that the "[u]se of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law' would violate the right to life".¹²⁸

Abandoned anti-personnel mines threaten to arbitrarily deprive civilians of their right to life. Deprivations of the right to life will be deemed arbitrary where they are conducted outside of the acceptable legal framework, which requires due process, predictability and appropriateness to achieve a legitimate aim. The fact that the use of landmines against civilians does not serve a legitimate military purpose and is contrary to IHL¹²⁹ supports this statement. As States Parties

124. CCPR, General Comment 36 (2018), paras. 2 and 67.

125. CCPR, General Comment 36 (2018), paras. 6 and 7.

126. CCPR, General Comment 36 (2018), para. 23.

127. CCPR, General Comment 36 (2018), para. 10-12.

128. CCPR, General Comment 36 (2018), para. 64.

129. Several provisions of Protocol II to the Weapons Convention impose precautionary measures to be taken when using mines, booby-traps and other explosive devices; Anti-personnel landmines are directly prohibited under the Anti-Personnel Mine Ban Treaty; The use of landmines against civilians violates the

(and where applicable non-State armed groups) have an obligation under IHRL to ensure the protection of individuals under their jurisdiction against arbitrary deprivation of life, this obligation should include a duty to engage in or facilitate humanitarian demining. Limiting demining to certain areas in violation of the prohibition on adverse distinction would also violate the right to life.

Article 7(1) of the ICCPR states that “[n]o one shall be subjected to **torture or to cruel, inhuman or degrading treatment** or punishment”.¹³⁰ This right, like the right to life, is non-derogable. The Human Rights Committee purposely does not enumerate or define specifically prohibited acts, in order to cover the widest range of infringements, including those that cause mental rather than physical suffering.¹³¹ It is conceivable that a deliberate omission by the State that results in subjecting individuals to life in mine-contaminated areas could amount to psychological suffering of a sufficient nature and intensity to qualify as cruel or inhuman treatment.¹³²

Freedom of movement is guaranteed under article 12 of the ICCPR. This right, which is considered “an indispensable condition for the development of a person”, may be limited in conformity with the principles of necessity and proportionality, and in consistency with other fundamental rights of the person. Restrictions must be provided by law and aimed at protecting national security, public order, public health or morals and the rights and freedom of others.¹³³

Civilians living in contaminated areas are de facto limited in their liberty of movement. Armed conflict is a circumstance which could justify a derogation to freedom of movement, but the principles of

necessity and proportionality would still have to be met. Restrictions to the freedom of movement cause by a refusal to demine an area or to grant access for humanitarian demining material would need to be assessed in light of these principles.

3.2.2 Economic, Social and Cultural Rights

The impact of landmine contamination goes beyond civil and political rights: it also impacts the ability of a population to develop, by preventing individuals from enjoying their fundamental economic, social and cultural rights. Even though their nature is different from the rights mentioned above, States have positive obligations to take steps towards the full realization of the human rights in question, including specific obligations to respect, protect and fulfil these rights, without discrimination.¹³⁴

Article 2(1) of the ICESCR¹³⁵ also indicates that this obligation takes into consideration the available resources of the State. The Committee for Economic, Social and Cultural Rights states that this consideration refers not only to the resources available internally, but also those available from the international community through international cooperation and assistance. States which are in a position to assist others in this regard are obligated to do so, and States unable to meet their obligations must take steps individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant.¹³⁶

principle of distinction; See Rules 1 and 81 of the ICRC Study on Customary IHL.

130. The prohibition of torture is also enshrined in article 2 of the CAT, and article 37(a) of the CRC.

131. Art 4(2) of the ICCPR ; CCPR, General Comment 20, Article 7 - Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment (10 March 1992), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6621&Lang=en, paras. 3-5; David WEISSBRODT, Cheryl HEILMAN, “Defining Torture and Cruel, Inhuman, and Degrading Treatment”, *Law & Inequality*, Vol. 29 No. 3/43 (2011), https://scholarship.law.umn.edu/faculty_articles/366, pp. 352-353.

132. *Ibid*, pp. 377-388.

133. CCPR, General Comment 27 (1999), paras. 1-2 and 11-18.

134. See Arts. 2(1), 2(2) and article 3 of ICESCR; CESCR, General Comment 14 (2000), paras. 18, 30, 33 and 52; CESCR, General Comment 15, Arts. 11 and 12: The Right to Water, E/C.12/2002/11 (20 January 2003), <https://www.undocs.org/e/c.12/2002/11>, paras. 13-16, 23 and 37.

135. International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966, in force 3 January 1976), UNTS Vol. 993, p. 3, <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028002b6ed> (hereafter ICESCR).

136. CESCR, General Comment 3, Art. 2(1): The Nature of States Parties’ Obligations, E/1991/23 (14 December 1990), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fICESCR%2fGEC%2f4758&Lang=en, paras. 13-14; CESCR, General Comment 14 (2000), para. 40; CESCR, General Comment 23, Art. 7: The right to just and favourable conditions of work, E/C.12/GC/23 (7 April 2016), <https://undocs.org/E/C.12/GC/23>, para. 67; CESCR, General Comment 13, Art. 13: The Right to Education, E/C.12/1999/10 (8 December 1999), <https://undocs.org/E/C.12/1999/10>, para. 56.

If limitations to these rights occur, they “must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society”.¹³⁷

The **right to health**¹³⁸ must be understood as “a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health”.¹³⁹ Taking into consideration the phenomenon of armed conflict,¹⁴⁰ the right extends to the underlying determinants of health, including healthy occupational and environmental conditions.¹⁴¹ It includes the provision of disaster relief and humanitarian assistance in emergency situations.¹⁴²

The **right to water**¹⁴³ requires that water be physically accessible, which includes safety while accessing water and sanitation facilities.¹⁴⁴ The special threat to this right posed by armed conflict was apparent to the Committee, which imposes on States parties a duty to refrain from “limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law”.¹⁴⁵ Moreover, in such cases, “the right to water embraces those obligations by which States parties are bound under international humanitarian law. This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water”.¹⁴⁶

The **right to adequate housing** “should be seen as the right to live somewhere in security, peace and dignity”.¹⁴⁷ Forced displacement due to armed conflict (due for instance to the impossibility to return to or to rebuild one’s house) may amount to forced evictions, which are *prima facie* incompatible with the right to adequate housing.¹⁴⁸

The right to decent work includes the right to safe working conditions,¹⁴⁹ which may be violated due to mine contamination. The right to education requires that education institutions be safely reachable for both students and teaching staff,¹⁵⁰ requiring that the path be free from unexploded devices. Demining can also be linked to the right to **take part in cultural life** and the obligation of States to take steps towards the conservation of culture.¹⁵¹

Where the above mentioned economic, social and cultural rights cannot be enjoyed because of

137. See Art. 4 of the ICESCR and CESCR, General Comment 14 (2000), para. 29.

138. Art. 12 of the ICESCR.

139. CESCR, General Comment 14 (2000), para. 9.

140. *Ibid.*, paras. 10 and 34; Common Article 3; Art. 75(2)(a) of AP I; Art. 4(a) of AP II.

141. CESCR, General Comment 14 (2000), para. 11.

142. *Ibid.*, para. 16.

143. Inferred from Arts. 11 and 12 of the ICESCR.

144. CESCR, General Comment 15 (2003), paras. 2, 12 and 37.

145. *Ibid.*, para. 21.

146. *Ibid.*, para. 22.

147. Art. 11(1) of the ICESCR; CESCR, General Comment 4 (1991), paras. 1 and 7.

148. CESCR, General Comment 7, Art. 11(1): The right to adequate housing – forced evictions, E/1998/22 (20 May 1997), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f6430&Lang=en, paras. 5-6.

149. Arts. 6 and 7 of the ICESCR ; CESCR, General Comment 18, Art. 6: The Right to Work, E/C.12/GC/18 (24 November 2005), <https://undocs.org/E/C.12/GC/18>, paras. 7 and 12; and CESCR, General Comment 23 (2016), paras. 25-30.

150. CESCR, General Comment 13 (1999), paras. 6, 27 and 31-37.

151. Art. 15 of the ICESCR; Demining is sometimes a precondition to reconstructing or reenabling access to world heritage sites. Examples include:
 - Al-Nouri Mosque in Mosul: UNESCO News, “UNESCO team in Iraq met in Mosul with the Director, Northern Regional Center for Explosives, the Director of Mines and Explosives Section (Ministry of Defense), and with representatives from the Department of Antiquities (SBAH)” (9 September 2019), <https://en.unesco.org/news/unesco-team-iraq-met-mosul-director-northern-regional-center-explosives-director-mines-and> ;
 - Palmyra in Syria: UNESCO Media Services, “UNESCO experts take preliminary stock of destruction in World Heritage site of Palmyra” (27 April 2016) http://www.unesco.org/new/en/media-services/single-view/news/unesco_experts_take_preliminary_stock_of_destruction_in_wor/ : “The participants had to examine damages to the Temple of Bel from a distance, as the edifice is still inaccessible and demining operations have not been completed”;
 - Preah Vihear Temple in Cambodia: Ernest Z. BOWER, “Southeast Asia from the Corner of 18 and K” (2 February 2011), Centre for Strategic International Studies, <https://www.csis.org/analysis/special-edition-%E2%80%932010-year-review> ;
 - The Bamiyan Valley in Afghanistan: Kern HENDRICKS, “Meet the Afghan Women Taking Their Country Back—One Land Mine at a Time” (8 October 2019), Foreign Policy, <https://foreignpolicy.com/2019/10/08/afghanistan-all-women-landmine-clearing-team-provides-jobs-and-hope/>.

landmine contamination which the State cannot address, it can be argued that there is a duty of the State to resort to international assistance to facilitate humanitarian demining.

3.2.3 Rights of the Child

The Convention on the Rights of the Child (CRC)¹⁵² guarantees a number of fundamental rights to all children without discrimination of any kind.¹⁵³ The Convention contains civil and political rights as well as economic, social and cultural rights. With respect to the latter, it is expressly stated that States shall take measures to implement them “to the maximum extent of their available resources and, where needed, within the framework of international cooperation”.¹⁵⁴ The Committee for the Rights of the child emphasises the need to ensure these fundamental rights to children and adolescents,¹⁵⁵ and stresses that they are exposed to greater threat context of armed conflict, requiring additional efforts on the part of the responsible State.

- In all matters pertaining to the child, its best interest must be the primary consideration. According to the Committee on the Rights of the Child, this assessment should notably include consideration of the child’s safety, protection from injury and armed conflict.¹⁵⁶
- Under article 6 of the CRC, States Parties recognize that every child has the inherent right to life and commit to ensure to the maximum extent possible the survival and development of the child.

- Article 19 of the CRC contains the obligation to protect children from all forms of violence or injury. The Committee for the Rights of the Child adds that international cooperation may be needed to address cross-border child protection issues.¹⁵⁷
- Under article 27(1), “States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development”.
- Article 24 of the CRC contains the right of the child to highest attainable standard of health, which can be affected by a variety of factors, including armed conflict.¹⁵⁸ States should prioritize the fulfilment of all obligations under this provision, among which taking appropriate measures to diminish infant and child mortality “even in the context of political or economic crisis or emergency situations”.¹⁵⁹
- Article 38 of the CRC contains a specific obligations for States to “to respect and to ensure respect for rules of international humanitarian law applicable (...) which are relevant to the child” and “[i]n accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict”.¹⁶⁰

The direct link between children’s rights and humanitarian demining is specifically mentioned by the Committee for the Rights of the Child in several of its General Comments:

- Children’s **right to play and leisure** is central in their life and development and play a therapeutic and rehabilitative role.¹⁶¹

152. Convention on the Rights of the Child (New York, 20 November 1989, in force 2 September 1990), UNTS Vol. 1577, p. 3, https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800007fe&clang=_en (hereafter CRC).

153. Art. 2 of the CRC.

154. Art. 4 of the CRC ; with respect to the right to health, see Art. 24(4) of the CRC and CRC, General Comment 5, General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5 (27 November 2003), <https://undocs.org/CRC/GC/2003/5>, paras. 60-64.

155. CRC, General Comment 20, The implementation of the rights of the child during adolescence, CRC/C/GC/20 (6 December 2016), <https://undocs.org/en/CRC/C/GC/20>, paras. 17, 79, 80 and 89; CRC General Comment 4 (2003), para. 38.

156. Art 3 of the CRC ; CRC, General Comment 14, Art. 3(1): The right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14 (29 May 2013), <https://undocs.org/en/CRC/C/GC/14>, p. 9.

157. CRC, General Comment 13, The right of the child to freedom from all forms of violence, CRC/C/GC/13 (18 April 2011), <https://undocs.org/en/CRC/C/GC/13>, para. 76.

158. CRC, General Comment 15, Art. 24: The right of the child to the enjoyment of the highest attainable standard of health, CRC/C/GC/15 (17 April 2013), <https://undocs.org/en/CRC/C/GC/15>, p. 2.

159. Ibid, p. 9.

160. Arts. 38(1) and 38(4) of the CRC.

161. Art 31 of the CRC ; CRC, General Comment 17, Art. 31: The Right of the child to rest, leisure, play, recreational activities, cultural life and the arts, CRC/C/GC/17 (17 April 2013), <https://undocs.org/en/CRC/C/GC/17>, pp. 2 and 9.

One of the main challenges to these rights is an unsafe environment, such as one contaminated by ERWs, to which children are particularly exposed due to their curiosity and playfulness.¹⁶² Among the active measures that should be taken to restore and protect the rights under article 31 in post-conflict and disaster situations, the Committee states: “[i]n areas where landmines pose a threat to the safety of children, investment must be made to ensure the complete clearing of landmines and cluster-bombs from all affected areas”.¹⁶³ It encourages international cooperation through the active engagement of UN agencies as well as international and national NGOs.¹⁶⁴

Concerned by the **disabilities** which may result from armed conflict, and incidentally lead to discrimination of disabled children,¹⁶⁵ the Committee notes that States affected by armed conflict during which landmines were laid, the location of which is not always known, face a particular challenge. International cooperation, including among State Parties and with UN agencies, is required to educate adults and children to the dangers of landmines and keep them away from said dangers, to locate remaining ERWs and to strengthen mine clearance activities, with a view to removing all ERWs and preventing further deaths and injuries.¹⁶⁶ While several human rights can be linked to the issue of mine-contamination, it appears that the rights of the child are most obviously and directly affected, as children comprise one-third of all landmine victims.

Parties to the armed conflict have the primary responsibility to uphold the above human rights of persons under their effective control. A State unable to meet its specific obligations in this respect is under obligation to resort to international assistance. All States have a duty to engage in international cooperation in order to achieve respect for international human rights law.¹⁶⁷ Given

the impact that mine contamination has on the abovementioned fundamental rights of a person, it is the State’s primary responsibility under IHRL to ensure respect for these rights by demining the area or seeking international assistance to do so. Where non-State armed groups control territory to the exclusion of the affected State and prevent it from effectively fulfilling its obligation to facilitate humanitarian demining, this responsibility is incurred by the armed group.

3.2.4 Specific considerations when applying the obligation to non-State armed groups

As previously mentioned, there is debate on whether, or the extent to which, non-State armed groups incur IHRL obligations. Unlike IHL, which explicitly regulates the reciprocal relationship between States and non-State armed groups and, where applicable, must apply equally to all parties to the conflict under the “equality of belligerents” principle, IHRL treaties explicitly govern the responsibilities of States vis-à-vis the civilian population and do not mention non-State entities. However, in situations where non-State armed groups are responsible for governing civilians living under their territorial control, organisations such as the ICRC and inter-governmental bodies such as the UN have called for IHRL obligations to be extended to non-State groups to avoid a legal gap in the protection of civilians, whether in times of active conflict or during a lull in hostilities. IHL’s regulation of non-State armed groups vis-à-vis the civilian population under their effective control is limited to humane treatment, judicial guarantees, and protection from a host of offences that would violate the obligation of humane treatment, such as torture, collective punishment, murder, pillage, slavery, and outrages upon personal dignity. Although the concept of “humane treatment” is broad and may be considered as a base-line protection for all persons under the effective control of a party to the conflict, it does not always provide the requisite specificity for protecting a person’s fundamental human rights under the control of a non-State armed group. Imposing IHRL obligations

162. CRC, General Comment 17 (2013), p. 6.

163. CRC, General Comment 17 (2013), p. 10.

164. CRC, General Comment 17 (2013), p. 12.

165. CRC, General Comment 9, The rights of children with disabilities, CRC/C/GC/9 (27 February 2007), <https://undocs.org/CRC/C/GC/9>, paras. 8-10.

166. *Ibid.*, paras. 23 and 55.

167. Oxford Guidance, para. 128; Arts. 55 and 56 of the UN Charter.

on non-State armed groups controlling territory is arguably a necessary means of overcoming this gap.¹⁶⁸

However, due limited resources, it is unlikely that non-State armed groups incur IHRL obligations to the same extent as States or face the same consequences for breach, particularly regarding the more technical provisions. The obligations on non-State groups must therefore be reasonably appropriate and adapted to the specific circumstances, but without losing the essence of the obligation or subjecting the recipients to inadequate human rights protection.

In the context of humanitarian demining, non-State armed groups are unlikely to have the necessary technical capacity or resources and may therefore be required to seek external assistance to fulfil their obligations under both IHL and IHRL. As previously identified, obtaining the trust of the non-State armed group and the cooperation of the affected State will be essential in ensuring that both parties to the conflict are able to discharge their responsibility to meet the needs of the civilian population and facilitate humanitarian demining.

3.3 Summary

This section has argued that States have the primary responsibility to meet the needs of the civilian populations under their effective control, but that, practically, this obligation may also be incurred by non-State armed groups that exercise government-like functions in the territory under their control. In situations where the presence of abandoned anti-personnel mines threatens the right to life of civilians due to their indiscriminate effect and prevents the delivery of essential humanitarian aid, it is submitted that this responsibility includes an obligation to facilitate humanitarian demining under both IHL and IHRL.

* Under IHL, parties to the armed conflict are obliged to provide “supplies essential to the survival of the civilian population” living

under their territorial control. In the situations identified above, humanitarian demining is essential to the survival of the civilian population and must therefore be facilitated by the State or non-State armed group.

* Under IHRL, parties to the armed conflict are required to ensure that persons under their territorial control are protected from arbitrary deprivations of the right to life and cruel, inhuman, or degrading treatment and provided with human rights essential for their survival. Where the presence of abandoned anti-personnel mines seriously infringes upon these rights, States and non-State armed groups are obliged to facilitate humanitarian demining.

As we shall see in the next Section, where parties to the armed conflict have failed to fulfil this obligation, impartial humanitarian organisations are entitled to offer humanitarian assistance and the State or non-State armed group is under an obligation not to arbitrarily refuse. Subject to certain restrictions, humanitarian demining can be classified as a form of humanitarian assistance (Section 5) and may therefore benefit from these legal regulations on the provision of humanitarian assistance (Section 6).

168. ICRC, Report on IHL and the challenges of contemporary armed conflicts: Recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions (22 November 2019), <https://shop.icrc.org/international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts-recommitting-to-protection-in-armed-conflict-on-the-70th-anniversary-of-the-geneva-conventions-3122.html> (Hereafter ICRC 2019 Report) pp. 52-54.

4. WHO IS ENTITLED TO OFFER HUMANITARIAN DEMINING ASSISTANCE WHEN THE CONCERNED PARTY TO THE ARMED CONFLICT FAILS TO MEET THE NEEDS OF THE CIVILIAN POPULATION?

Under IHL, where a party to the armed conflict has failed to provide supplies and services essential to the survival of the civilian population under its control, impartial humanitarian organisations are entitled to offer humanitarian assistance. To this end, this Section provides the following conclusions:

1. The right of impartial humanitarian organisations to offer humanitarian assistance is triggered where the civilian population is inadequately provided with the means essential for their survival.
2. “Impartial humanitarian organisations” are defined as entities whose mission is to prevent and/or alleviate suffering in armed conflict and who are capable of acting effectively and are worthy of trust due to the humanitarian and impartial nature of the organisation.
3. “Humanitarian assistance” is defined as activities aimed at preserving life and personal security, alleviating suffering, and addressing the essential needs of victims of armed conflict that are provided in accordance with the fundamental principles of humanity, impartiality, neutrality, and independence (the “fundamental principles” of humanitarian assistance).

4.1 Triggering the right of impartial humanitarian organisations to offer humanitarian assistance

The right of impartial humanitarian organisations to offer humanitarian assistance is triggered where the party to the armed conflict has failed to provide supplies and services essential to the survival of the civilian population. This rule is derived from

law of Occupation in Articles 55 of GC IV and 69 of AP I, and the law regulating the provision of humanitarian assistance in Articles 70(1) of AP I and 18(2) of AP II. The Guiding Principles on the Right to Humanitarian Assistance similarly states that the right to humanitarian assistance may be invoked where the “essential humanitarian needs of human beings in an emergency are not being met, so that the abandonment of victims without assistance would constitute a threat to human life or a grave offence to human dignity”.¹⁶⁹ Moreover, the ICRC’s Customary IHL Study has concluded that the obligation to allow and facilitate humanitarian assistance to civilians in need is applicable in both international and non-international armed conflicts and the content of these rights and obligations is essentially the same in both typologies.

Providing the offer of humanitarian assistance comes from an impartial humanitarian organisation that operates without adverse distinction, it shall not be regarded as interference in the armed conflict or as an unfriendly act¹⁷⁰ This rule is consistent with general public international law, which provides that exclusively humanitarian assistance is not be considered as unlawful foreign intervention in domestic affairs.¹⁷¹ Most IHRL instruments do not explicitly refer to the right to offer humanitarian assistance,¹⁷² although some General Comments of human rights treaty-bodies refer to the need

169. Principle 3(a) of the Guiding Principles on the Right to Humanitarian Assistance.

170. *Ibid*, Principle 5.

171. UNGA Resolution 46/182 (1991) ; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment (26 November 1984), I.C.J. Reports 1984, p. 392, (hereafter “ICJ Nicaragua judgment”) paras. 97 and 242.

172. Swiss FDFA Handbook, pp. 29 ff.

for international cooperation to achieve human rights.¹⁷³ Offers of humanitarian assistance have no implication on the international legal status of the recipient of the offer,¹⁷⁴ and the services offer may include humanitarian activities,¹⁷⁵ protection,¹⁷⁶ and various forms of relief and/or assistance.¹⁷⁷ The beneficiaries of these services include all victims of conflicts.¹⁷⁸

4.2 Defining “impartial humanitarian organisations” under IHL

As a general rule, the **ICRC** or **any impartial humanitarian organisation** may, subject to the consent of the Parties to the conflict concerned, undertake humanitarian activities for the protection and relief of civilian persons.¹⁷⁹ The organisation itself, as well as its activities, must be humanitarian and impartial.¹⁸⁰

The ICRC defines impartial humanitarian organisations as “[e]ntities with a mission to prevent and/or alleviate human suffering in armed conflicts”.¹⁸¹ Also referred to in IHL as “**impartial humanitarian bodies**”,¹⁸² impartial humanitarian organisations can take various forms. “Relief societies” are humanitarian organisations recognised by the government of the State in which they operate and enjoy special status under domestic law. This category mainly refers to the National Societies of the Red Cross or Red Crescent. Non-Governmental Organisations (NGOs), sometimes referred to as Civil Society Organisations (CSOs),¹⁸³ can also undertake humanitarian relief. Inter-governmental Organisations (IOs), such as the United Nations, also conduct humanitarian operations through

some of their programmes. Particularly relevant to humanitarian demining is UNMAS, which often conducts its operations alongside UN peacekeeping forces mandated by the UN Security Council.¹⁸⁴ Finally, the ICRC is a humanitarian organisation with a special status and mandate given to it by the international community in the Geneva Conventions and their Additional Protocols.

Under law of Occupation, relief schemes shall be undertaken by **neutral States**, or by **impartial humanitarian organisations**, defined as “any institution capable of acting effectively and worthy of trust (...) provided the assistance is not used for political propaganda”, such as the **ICRC**.¹⁸⁵ The right to supervise the distribution of the assistance may be delegated to a neutral power (third state), the ICRC or any other impartial humanitarian organisation. Such organisations “must not only offer proof of being impartial, but must also have available the necessary qualified staff and material resources”.¹⁸⁶

Under Common Article 3(2), applicable in NIAC, an **impartial humanitarian body, such as the ICRC**, may offer its services. To qualify as an impartial humanitarian body:

- there is no requirement that the activities of the organisation are limited to humanitarian ones in other contexts where it operates;
- a minimum structure is required (not merely a gathering of individuals);
- “the fact that money is involved can by no means be considered as depriving the organization or its activities of their humanitarian character”, but actors working for profit do not qualify;
- impartiality is required and refers to operating solely based on needs, giving priority to the most urgent cases of distress, and without making any adverse distinction; and

173. See section 3.2 above.

174. ICRC, Commentary of 2016, para. 805.

175. ICRC, Commentary of 2016, paras. 807-813.

176. ICRC, Commentary of 2016, paras. 814-818.

177. ICRC, Commentary of 2016, paras. 819-821.

178. ICRC, Commentary of 2016, para. 824.

179. Art. 10 of GC IV.

180. ICRC, ICRC, Commentary on the Fourth Geneva Convention: Convention (IV) relative to the Protection of Civilian Persons in Time of War (1958), (hereafter Commentary of 1958), pp. 93-94.

181. ICRC, “Humanitarian Organisations”, How does Law protect in War, <https://casebook.icrc.org/>.

182. Art 70(1) of AP I.

183. ICRC, “Non-Governmental Organisations”, How does Law protect in War, <https://casebook.icrc.org/>.

184. Malcolm N. SHAW, International Law, 6th edition, Cambridge University Press, 2008, pp. 1224-1225.

185. Art. 59(2) of GC IV; ICRC, Commentary of 1958, p. 321.

186. Art. 61 of GC IV; ICRC, Commentary of 1958, p. 326.

- neutrality in the sense of the organisation's identity is not legally required but may be necessary from an operational perspective.¹⁸⁷ Neutrality in the sense of conducting operations in a manner that does not provide a definite military advantage to a party to the conflict is definitional prerequisite for humanitarian assistance, as discussed in subsection 4.3 and Section 5.
- access by humanitarian actors to people in need of assistance and protection; and
- access by those in need to the goods and services essential for the survival of the civilian population when conducted in a manner consistent with the fundamental principles of humanitarian assistance.

Under AP II, applicable in NIAC, relief societies located in the territory of the State party (such as National Societies) may offer their services,¹⁸⁸ and in addition other relief action for the civilian population may be undertaken by the ICRC or any other impartial humanitarian organisation.¹⁸⁹

Notwithstanding differences in the specificity of treaty instruments regulating humanitarian assistance in international versus non-international armed conflicts, the definition and scope of an “impartial humanitarian organisation” and its personnel are essentially the same. Humanitarian organisations, as well as their activities, must be humanitarian and impartial in character,¹⁹⁰ and priorities must be given to categories of persons entitled to special protection.¹⁹¹ Parties to the conflict have a duty to ensure the safety of impartial humanitarian relief organisations operating in their territory under their effective control and to facilitate access to all persons in need.¹⁹²

Where it is established that the needs of the civilian population are not met,¹⁹³ and offers of services are made by humanitarian organisations which respect the principles of humanitarian assistance,¹⁹⁴ consent to the humanitarian operation should be given by the authority in control of the territory where the aid is meant to be delivered.¹⁹⁵ In that case, said authority has the obligation to allow and facilitate humanitarian access. **Humanitarian access** refers to:

Landmine contaminations can effectively preclude humanitarian access.¹⁹⁶ Therefore, in addition to being a form of humanitarian assistance, humanitarian demining is a prerequisite to delivering the common forms of assistance, such as food and medical supplies, and must be considered as an aspect of humanitarian access.

4.3 Defining “humanitarian assistance” under IHL

As a legal concept, humanitarian assistance in the context of armed conflict has two fundamental components. Firstly, it comprises “humanitarian activities” that are aimed at preserving life and personal security, alleviating suffering, and addressing the essential needs of victims of armed conflict. Secondly, humanitarian assistance presupposes adherence to the “fundamental principles humanitarian assistance”; namely, humanity, impartiality, neutrality, and independence.¹⁹⁷ The fundamental principles, “while not sharing the status of legal norms in their entirety”,¹⁹⁸ have come to represent a quasi-legal standard for defining humanitarian activities as “humanitarian assistance” under IHL, as will be discussed in section 5.

4.3.1 Humanitarian activities

IHL recognises that civilians affected by armed conflict are entitled to receive humanitarian assistance and specifies the conditions under which such assistance may be offered, accepted

187. Common Article 3; ICRC, Commentary of 2016, paras. 788-799.

188. Art 18(1) of AP II.

189. Art 18(2) of AP II; ICRC, Commentary of 1987, para. 4879.

190. ICRC, Commentary of 1987, paras. 2798-2804 and 2811-2812.

191. ICRC, Commentary of 1987, paras. 2813-2822.

192. See footnotes 12-13 above; Art. 17 of GC IV.

193. See section 3.1.1 above.

194. See section 5 below.

195. See section 6.1 below.

196. UNSC, 8645th Meeting, op. cit., p.7.

197. Erin A. WEIR, “Conflict and Compromise: UN Integrated Missions and the Humanitarian Imperative”, KAIPTC Monograph, No. 4, Accra (June 2006), <https://www.kaiptc.org/wp-content/uploads/2017/03/New%20folder/WeirE.-2006-Conflict-and-Compromise-UN-Integrated-Missions-and-Humanitarian-Imperative.pdf>, p. 16.

198. ICRC, Professional Standards for Protection Work, 3rd edition (20 March 2018), <https://www.icrc.org/en/publication/0999-professional-standards-protection-work-carried-out-humanitarian-and-human-rights>, p. 80.

or denied, and delivered. The definition of “humanitarian activities” will depend on the needs of the affected population, but it is clear that, at a minimum, all goods and services necessary for the survival and immediate wellbeing of persons affected by armed conflict are included within the concept of humanitarian activities under IHL. The United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) defines assistance as “[a]id provided to address the physical, material and legal needs of persons of concern”.¹⁹⁹ The Swiss Federal Department of Foreign Affairs (Swiss FDFA) adds that humanitarian aid and humanitarian relief are to be considered synonyms of humanitarian assistance, and refer to “activities and resources that seek to provide only goods and services essential for meeting the basic needs of persons in situations of armed conflict”.²⁰⁰ The ICRC defines humanitarian activities as being “all those aimed at preserving life and security or seeking to restore or maintain the mental and physical well-being of victims of armed conflict”.²⁰¹ Furthermore, the ICRC official policy states that humanitarian activities includes those “that seek to make individuals more secure and to limit the threats they face, by reducing their vulnerability and/or their exposure to risks, particularly those arising from armed hostilities or acts of violence”.²⁰² These definitions of humanitarian activities logically include humanitarian demining.

A **humanitarian operation** is an operation to provide humanitarian assistance. UNOCHA defines humanitarian operations as those “conducted to relieve human suffering, especially in circumstances where responsible authorities in the area are unable or unwilling to provide adequate service support to civilian populations”.²⁰³ Authors have more recently defined humanitarian relief operations as “operations to provide food, water, medical supplies, clothing, bedding, means of

shelter, heating fuel, and other supplies and related services essential for the survival of the civilian population, as well as objects necessary for religious worship”.²⁰⁴ A humanitarian convoy should be understood as “a group of vehicles (...) travelling together”²⁰⁵ in order to deliver humanitarian assistance, as part of a humanitarian operation.

As previously discussed, humanitarian demining is an essential means of protecting civilians from the indiscriminate effect of abandoned mines and of alleviating the suffering of affected communities by clearing an area for the safe delivery of other essential forms of humanitarian aid, such as food, water, and medical supplies. Humanitarian demining equipment is therefore an essential component of humanitarian convoys destined for mine-contaminated areas. Indeed, any activity that satisfies the concept of “supplies essential to the survival of the civilian population”, as discussed in Section 3.1, is by definition a “humanitarian activity” under IHL. Humanitarian demining equipment and operations therefore satisfy the first limb of the definition of humanitarian assistance under IHL.

4.3.2 The fundamental principles of humanitarian assistance

The fundamental principles of humanitarian assistance are defined in the following terms:

- **Humanity** requires that human suffering be addressed wherever it is found, with particular attention to the most vulnerable in the population, such as children, women and the elderly. The dignity and rights of all victims must be respected and protected.²⁰⁶ This is a reminder that the “purpose of humanitarian

199. UNOCHA 2008 Glossary, p. 10.

200. Swiss FDFA Handbook, p. 10.

201. ICRC, Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflict (October 2015), 32nd Conference of the Red Cross and Red Crescent (8-10 December 2015), <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts> (hereafter 2015 Challenges Report), p. 29.

202. ICRC, “ICRC Protection Policy: Institutional Policy,” International Review of the Red Cross Vol. 90, No. 871 (2008), p. 752.

203. UNOCHA 2008 Glossary, p. 30.

204. Oxford Guidance, para. 5; see also Emanuela-Chiara GILLARD, “The Law regulating cross-border relief operations”, International Review of the Red Cross, Vol. 95, No. 890 (2013), pp. 351–382, https://international-review.icrc.org/sites/default/files/irrc-890-gillard_1.pdf, p. 352.

205. Collins Dictionary, “Convoy”, <https://www.collinsdictionary.com/dictionary/english/convoy>.

206. European Civil Protection and Humanitarian Aid Operations (ECHO), Humanitarian Principles, (last updated 12 July 2019), https://ec.europa.eu/echo/who/humanitarian-aid-and-civil-protection/humanitarian-principles_en.

action is to protect life and health and ensure respect for human beings”.²⁰⁷

- Under the principle of **impartiality**, “humanitarian action must be carried out on the basis of need alone, giving priority to the most urgent cases of distress and making no distinctions on the basis of nationality, race, gender, religious belief, class or political opinions”.²⁰⁸ This prohibition of discrimination is often referred to in IHL provisions as the prohibition of any “adverse distinction”.²⁰⁹ Relief of the suffering must be guided solely by needs and priority must be given to the most urgent cases of distress.²¹⁰ This however “does not preclude particularly vulnerable categories of people from receiving preferential treatment, including for example, children and expectant or nursing mothers”.²¹¹
- According to the principle of **neutrality**, humanitarian assistance must be provided without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature.²¹² Neutrality means that humanitarian aid must not favour any side in an armed conflict or other dispute.²¹³
- Finally, **independence** dictates that humanitarian action be “autonomous from the political, economic, military or other objectives that different stakeholders may hold in areas where humanitarian action is being implemented”.²¹⁴ The ICRC defines its independence as “resistance to any pressure from outsiders – whether they are donors, international bodies, governments or armed groups – that would affect the ICRC’s ability to

respond effectively to humanitarian needs, in accordance with its fundamental principles”.²¹⁵

4.3.3 The legal status of the fundamental principles of humanitarian assistance

The fundamental principles of humanitarian assistance have come to represent a quasi-legal threshold for defining humanitarian activities provided to victims of armed conflict as “humanitarian assistance” under IHL. The principles of humanity and impartiality are expressly mandated in the text of the Geneva Conventions and Additional Protocols and thus constitute a definitional prerequisite for the concept of humanitarian assistance. Neutrality in the sense of not-engaging in the hostilities and avoiding providing a definite military advantage to a party to the conflict is equally non-negotiable, the violation of which would constitute an unlawful interference in the sovereign affairs of affected the State, provide that State with a legitimate reason to refuse the assistance under IHL, and place the perpetrator at risk of reprisal. Neutrality and independence in the sense of non-political affiliation and control are generally considered “operational” principles that are not legally required in the definition of humanitarian assistance per se, but which are often essential in obtaining the trust of the relevant territorial authority to gain access and to ensure operational compliance with the principles of humanity and impartiality.

4.3.3.1 Basis in the Geneva Conventions and Additional Protocols

Humanity and impartiality

The Geneva Conventions and Additional Protocols explicitly limit the provision of humanitarian assistance to neutral States and humanitarian organisations operating in accordance with the principles of **humanity** and **impartiality**. Under the law of international armed conflict, Article 9 of GCs I, II, and III and Article 10 of GC IV state that the Conventions are without prejudice to the “humanitarian activities” that an “impartial humanitarian organisation” may undertake to provide relief to the victims of armed conflict. Article 59 of GC IV obliges an Occupying Power to consent to relief schemes undertaken by

207. UNOCHA, “What are humanitarian principles?” OCHA on message: Humanitarian Principles, (June 2012), https://www.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf.

208. Ibid.

209. UNOCHA 2008 Glossary, p. 30.

210. UNOCHA 2008 Glossary, pp. 30-31; ICRC, Glossary – Terms used in IHL (January 2009), <https://www.icrc.org/en/doc/what-we-do/building-respect-ihl/education-outreach/ehl/ehl-other-language-versions/ehl-english-glossary.pdf> (hereafter ICRC 2009 Glossary), p. 8 ; ECHO, Humanitarian Principles, *ibid*.

211. Oxford Guidance, para. 8.

212. UNOCHA, “What are humanitarian principles?” *op. cit*.

213. ECHO, Humanitarian Principles, *op. cit*.

214. UNOCHA, “What are humanitarian principles?” *op. cit.*; ECHO, Humanitarian Principles, *op. cit*.

215. ICRC 2009 Glossary, p. 8.

“impartial humanitarian organisations” and must “facilitate them by all means at its disposal”. Article 70(1) of AP I requires “relief actions which are humanitarian and impartial in character and conducted without any adverse distinction”. Under the law of NIAC, Common Article 3 to the Geneva Conventions limits the right to offer humanitarian assistance to “an impartial humanitarian body” and Article 18(2) of AP II requires “relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction”. The ICRC Customary IHL Study determines that the rules relating to the provision of humanitarian assistance under IAC are equally applicable in NIAC.

Neutrality and independence

While **neutrality** is not explicitly mentioned in the texts of the Geneva Conventions or Additional Protocols, it is implied as a precondition to impartiality and humanity. This is demonstrated in the Commentary to Article 59 of Geneva Convention IV, which states that “only those States which are neutral ... are capable of providing guarantees of impartiality”. The Commentary goes on to explain that the term “impartial humanitarian organisation” is wide enough to cover any institution or organisation “capable of acting effectively and worthy of trust”, noting that the ICRC is explicitly mentioned because its “impartiality is assured”. The implication from this text is that a humanitarian organisation that is not neutral, i.e. one who seeks to advantage a particular side to the conflict, is not “worthy of trust” and is therefore equally as incapable of providing guarantees of impartiality as a non-neutral State. An organisation that uses its position to influence the outcome of the conflict is also failing to comply with the obligation of humanity, which requires the provision of assistance to be motivated solely by humanitarian need.

The principle of **neutrality** is also implied in Article 23(c) of GC IV, which states that the obligation to permit free passage of humanitarian goods only applies if the party to the conflict “is satisfied that there are no reasons for fearing ... that a military advantage may accrue to the military efforts

or economy of the enemy”.²¹⁶ Accordingly, non-neutral humanitarian assistance, i.e. assistance that would provide a definite military advantage, may be legitimately refused by the affected State or territorial authority. As stated by Hugo Slim and Miriam Bradley, “Article 23 of the Fourth Geneva Convention states clearly that aid can be withheld if there is evidence that through this aid a definite military advantage may accrue to the military efforts or economy of the enemy”.²¹⁷ Collinson and Elhawary have likewise stated that despite the lack of explicit reference to neutrality, it is inferred from the fact that “authorities may refuse humanitarian action if it interferes with a military strategy or aids the other side of the conflict”.²¹⁸ Meanwhile, humanitarian organisations that do comply with the fundamental principles of humanitarian assistance are “entitled to insist on access to populations in need”.²¹⁹

The principle of **neutrality** is also implied in the obligation under Article 18(2) of AP II for relief societies to undertake relief actions of an “exclusively humanitarian and impartial nature which are conducted without any adverse distinction”. The commonly-accepted definition of “exclusively humanitarian” assistance is assistance that is determined solely on the basis of humanitarian need and is, in particular, not motivated by political, military, or religious factors. Neutrality, meanwhile, is defined as the obligation to provide assistance “without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature”. “Exclusively humanitarian aid” and “neutral humanitarian aid” are therefore synonymous concepts.

216. Art. 23(c) of GC IV.

217. Hugo SLIM and Miriam BRADLEY, *Principled Humanitarian Action and Ethical Tensions in Multi-Mandate Organizations*, commissioned by World Vision (March 2013), https://interagencystandingcommittee.org/system/files/legacy_files/Slim,%20WV%20Multi-Mandate%20Ethics%20FinalDraft.pdf, p. 13.

218. Sarah COLLINSON and Samir ELHAWARY, “Humanitarian Space: A Review of Trends and Issues”, *Humanitarian Policy Group Report*, No. 32, HPG-ODI, London (2012), <http://www.odi.org.uk/resources/docs/7643.pdf> cited in Ingrid MACDONALD and Angela VALENZA, *Tools for the Job: Supporting Principled Humanitarian Action*, commissioned by NRC and HPG-ODI (October 2012), <https://www.nrc.no/globalassets/pdf/reports/tools-for-the-job---supporting-principled-humanitarian-action.pdf>, p. 4.

219. Nicholas LEADER, “The Politics of Principle: The Principles of Humanitarian Action in Practice”, *Humanitarian Policy Group Report*, No. 2, HPG-ODI, London, (March 2000), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/311.pdf>, p. 14.

The fact that there are distinct legal consequences for complying, or failing to comply, with the fundamental principles of humanitarian assistance demonstrates that the concepts of humanity, impartiality, and neutrality “clearly exist in international law”²²⁰ and carry independent legal weight. The principle of **independence**, meanwhile, is understood as an operational prerequisite to ensure compliance with the principles of humanity, impartiality, and neutrality, especially during multi-mandated UN peacekeeping missions in complex emergencies.

4.3.3.2 Endorsement by the international community

The importance of the fundamental principles is affirmed in several official documents, resolutions, and reports of intergovernmental institutions and humanitarian NGOs, demonstrating their acceptance by the international community. The Annex to UN General Assembly Resolution 46/182 (1991) states that humanitarian assistance must be provided in accordance with humanity, impartiality, and neutrality. General Assembly Resolution 58/114 added “independence” as a fourth principle in what is now referred to within the UN system as the “principles of humanitarian assistance” or “guiding principles of humanitarian assistance”. As stated by UNOCHA, “UN intergovernmental bodies have a practice to reiterate key language of previous decisions to highlight their importance”,²²¹ and the obligation to adhere to the principles of humanity, impartiality, neutrality, and independence has been systematically reaffirmed in all relevant subsequent General Assembly Resolutions.²²² The Security Council has consistently “recalled”, “reaffirmed” and “demanded” respect for the guiding principles of humanitarian assistance across 46 Resolutions between 2015 and 2020.²²³ Individual States have also continued to stress that humanitarian assistance must adhere to

the principles,²²⁴ and while the majority of States focused discussion on the obligation to ensure unhindered humanitarian access,²²⁵ failure to comply with these principles has at times been cited as a reason that would justify restricting access.²²⁶

The following organisations have also adopted the fundamental principles of humanitarian assistance:

- The UNOCHA Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies states that “[h]umanitarian assistance must be provided in accordance with the basic humanitarian principles of humanity, impartiality and neutrality”.²²⁷
- The European Consensus on Humanitarian Aid states that “[t]he EU is firmly committed to upholding and promoting the fundamental

2019); 2463, S/RES/2463 (29 March 2019); 2459, S/RES/2459 (15 March 2019); 2449, S/RES/2449 (13 December 2018); 2445, S/RES/2445 (15 November 2018); 2429, S/RES/2429 (13 July 2018); 2416, S/RES/2416 (15 May 2018); 2409, S/RES/2409 (27 March 2018); 2406, S/RES/2406 (15 March 2018); 2393, S/RES/2393 (19 December 2017); 2387, S/RES/2387 (15 November 2017); 2386, S/RES.2386 (15 November 2017); 2363, S/RES/2363 (29 June 2017); 2352, S/RES/2352 (15 May 2017); 2348, S/RES/2348 (31 March 2017); 2340, S/RES/ 2340 (8 February 2017); 2332, S/RES/2332 (21 December 2016); 2328, S/RES 2328 (19 December 2016); 2327, S/RES/2327 (16 December 2016); 2318, S/RES/2318 (15 November 2016); 2301, S/RES/2301 (26 July 2016); 2296, S/RES/2296 (29 June 2016); 2290, S/RES/2290 (31 May 2016); 2287, S/RES/2287 (12 May 2016); 2277, S/RES/2277 (30 March 2016); 2265, S/RES/2265 (10 February 2016); 2259, S/RES/2259 (23 December 2015); 2258, S/RES/2258 (22 December 2015); 2252, S/RES/2252 (15 December 2015); 2251, S/RES/2252 (15 December 2015); 2241, S/RES/2241 (9 October 2015); 2238, S/RES/2238 (10 September 2015); 2230, S/RES/2230 (14 July 2015); 2228, S/RES/2228 (29 June 2015); 2223, S/RES/2223 (28 May 2015); 2217, S/RES/2217 (28 April 2015); 2213, S/RES/2213 (27 March 2015); 2211, S/RES/2211 (26 March 2015); 2206, S/RES/2206 (3 March 2015); 2205, S/RES/2205 (26 February 2015); 2200, S/RES/2200 (12 February 2015).

224. See for example: UN Meetings Coverage, “General Assembly Adopts 4 Resolutions Aimed at Strengthening Coordination of Humanitarian, Disaster Relief Assistance” (14 December 2018), <https://www.un.org/press/en/2018/ga12106.doc.htm>.

225. UNSC, Department of Political Affairs - Security Council Affairs Division Security Council Practices and Charter Research Branch, “29. Protection of civilians in armed conflict”, *Repertoire of the Practice of the Security Council*, 18th Supplement (2012-2013), https://www.un.org/en/sc/repertoire/2012-2013/Part%20I/Thematic%20issues/2012-2013_POC.pdf, p. 5.

226. *Ibid* (statement by the Representative of Pakistan), p. 3.

227. UNOCHA, *Guidelines On The Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies* (March 2003, Revision 1 2006), <https://www.unocha.org/sites/unocha/files/01.%20MCDA%20Guidelines%20March%2003%20Rev1%20Jan06.pdf>, p.3.

220. *Ibid*.

221. UNOCHA, *Compilation of United Nations Resolutions on Humanitarian Assistance: Selective Resolutions of the General Assembly, Economic and Social Council and Security Council Resolutions and Decisions*, (2009) Policy and Study Series, https://www.un.org/ruleoflaw/files/Compilation_OCHA_Humanitarian_Resolutions_2009.pdf, p. 2.

222. *Ibid*.

223. UNSC Resolutions: 2504 (2020); 2502, S/RES/2502 (19 December 2019); 2499, S/RES/2499 (15 November 2019); 2497, S/RES/2497 (14 November 2019); 2469, S/RES/2469 (14 May

humanitarian principles of humanity, neutrality, impartiality and independence”.²²⁸

- United Nations Humanitarian Civil-Military Coordination (UN-CMCoord).²²⁹
- UN High Commissioner for Refugees has stated that “[i]n all situations, it is essential for the humanitarian organizations to maintain the strictly non-political, neutral and impartial nature of their mandates”.²³⁰
- The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies.²³¹
- Guiding Principles on the Right to Humanitarian Assistance, adopted by the Council of the International Institute of Humanitarian Law at its session in April 1993.
- Multiple International NGOs that have undertaken the Core Humanitarian Standard certification, which upholds the fundamental principles.²³²
- The Oxford Guidance does not explicitly cite the principle of neutrality, but states that humanitarian assistance must be “exclusively humanitarian” and “must not constitute an interference in the armed conflict or in the internal affairs of the parties to the conflict”.²³³ As discussed, this statement is synonymous

with the definition of neutrality in the context of humanitarian assistance.

The fundamental principles of humanitarian assistance are essential for the practical purpose of gaining trust and ensuring access to victims of armed conflict; as stated by former UN-Secretary General Ban-Ki Moon “we must be steadfast in our resolve that only impartial, neutral and independent humanitarian action will allow us to access people in need, wherever they are”.²³⁴ In addition to their importance as operational tools, the fundamental principles have also come to represent a quasi-legal threshold for the definition of humanitarian assistance in armed conflict.²³⁵

4.4 Summary

In situations where the essential needs of the civilian population are inadequately provided for, IHL authorises impartial humanitarian organisations and neutral third-party States to offer humanitarian assistance. This Section has defined the concepts of “impartial humanitarian organisation” and “humanitarian assistance” under IHL. Impartial humanitarian organisations are those whose internal structure and activities are premised on the principles of humanity and impartiality, delivering essential services to those in need without adverse discrimination. Humanitarian assistance, meanwhile, comprises two essential components. Firstly, it concerns activities aimed at preserving life and personal security, alleviating suffering, and addressing the essential needs of victims of armed conflict. Secondly, it presupposes adherence to the fundamental principles of humanity, impartiality, neutrality, and independence. To varying degrees, these fundamental principles represent a legal threshold for defining humanitarian activities as “humanitarian assistance” under IHL.

228. ECHO, “The European Consensus on Humanitarian Aid – The Humanitarian Challenge”, Joint Statement by the Council and the Representatives of the Governments of the member States meeting within the Council, the European Parliament and the European Commission, (2008), https://ec.europa.eu/echo/files/media/publications/consensus_en.pdf, p. 10.

229. UN-CMCoord, Field Handbook, Version 2.0 (2018), <https://www.cimic-coe.org/wp-content/uploads/2019/01/E-Version-UNCMCoord-Field-Handbook-2.0-2018-1.pdf>, pp. 16, 98–99.

230. UNHCR, “The Role of Humanitarian Action in Peacekeeping” – Keynote Address by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, at the 24th Annual Vienna Seminar”, Vienna (5 July 1994) <https://www.unhcr.org/en-au/admin/hcspeeches/3ae68faa18/role-humanitarian-action-peacekeeping-keynote-address-mrs-sadako-ogata.html>.

231. Jon M. EBERSOLE, “Mohonk criteria for humanitarian assistance in complex emergencies”, *Disaster Prevention and Management* (1995), Vol. 4 No. 3, pp. 14–24, <https://doi.org/10.1108/09653569510088032>.

232. Core Humanitarian Standard on Quality and Accountability (2014), CHS Alliance, Group URD and the Sphere Project, <https://corehumanitarianstandard.org/files/files/Core%20Humanitarian%20Standard%20-%20English.pdf>, p. 8. The list of NGOs can be found here: <https://www.chsalliance.org/about/our-members/>.

233. Oxford Guidance, para. 8.

234. United Nations Secretary-General Ban Ki-moon (22 September 2016) <https://news.un.org/en/story/2016/09/540112-ban-calls-global-leaders-take-forward-goals-world-humanitarian-summit>.

235. Jeremie LABBE and Pascale DAUDIN, “Applying the humanitarian principles: Reflecting on the experience of the International Committee of the Red Cross”, *International Review of the Red Cross* (2015), Vol. 97, No. 897/898, pp. 183–210, https://international-review.icrc.org/sites/default/files/irc_97_1-2-8.pdf, p. 188 (“Humanitarian action is acceptable if it is limited to providing assistance and protection to the victims of conflicts – the essence of the principle of humanity – and “must not be affected by any political or military consideration”).

5. CAN HUMANITARIAN DEMINING BE CLASSIFIED AS “HUMANITARIAN ASSISTANCE” UNDER IHL?

It has already been explained that, in certain contexts, humanitarian demining equipment and services should be classified as “supplies essential to the survival of the civilian population”. By definition, humanitarian demining is therefore a “humanitarian activity” and satisfies the first limb of the definition of “humanitarian assistance” under IHL.

This section considers humanitarian demining against each of the fundamental principles of humanity, impartiality, neutrality, and independence. Subject to several constraints on the means and mode of operation, it is proposed that humanitarian demining can be compliant with each of these principles for the following reasons:²³⁶

1. Humanitarian demining is a response to the disproportionate impact of mines on the civilian population. It is necessary to protect civilians from mines and facilitate the delivery of other forms of essential humanitarian aid, such as food, water, shelter, and medical supplies. Humanitarian demining is therefore compliant with the principle of humanity.
2. Where humanitarian demining is executed solely on the basis of humanitarian need without adverse discrimination on the basis of nationality, race, gender, religious belief, class or political opinion, it is compliant with the principle of impartiality.
3. The principle of neutrality has two components. Firstly, humanitarian assistance must not constitute an engagement in the hostilities by providing a definite military advantage to a party to the conflict. Humanitarian demining

presents an inherent risk to this principle given the relationship with mines and military objectives. However, it is submitted that where humanitarian demining is aimed at removing abandoned anti-personnel mines from civilian-populated areas, its sole purpose is to protect civilians from their indiscriminate effect and facilitate essential aid, and therefore cannot be seen to provide or deprive a party to the conflict of a definite military advantage. Secondly, neutrality means that humanitarian demining should not be politicised. While neutrality as non-politicisation is predominantly an operational tool to obtain the consent of a party to the conflict, it is often necessary to comply with the principles of humanity and impartiality. Any political influence over humanitarian demining operations must not conflict with the obligations of humanity and impartiality.

4. The principle of independence requires decision-making autonomy from the political, economic, military or other objectives of different stakeholders operating in the region. While adherence to the principle of independence in one of degree, especially in complex multi-mandated missions involving UN peacekeeping forces, it generally operates as a precondition for compliance with the other fundamental principles of humanitarian assistance. Humanitarian demining organisations must exercise sufficient decision-making independence to enable them to respond solely on the basis of need, without adverse distinction, free from undue political influence.

5.1 Humanity

The principle of **humanity** requires that human suffering be addressed wherever it is found, with particular attention to the most vulnerable in the population, such as children. Where humanitarian demining is directed at populations most in

²³⁶ The UN Secretary General has stated that “[e]ffective mine action, driven by needs and centred on people, is grounded in, and promotes and protects, international human rights law and international humanitarian law. The normative frameworks governing mine action promote victim assistance and the inclusion and participation of survivors in all aspects of life”. See UNSG 2017 Report, para. 14.

need, as determined by appropriate surveying in accordance with the five pillars of humanitarian mine action, it complies with the principle of humanity. The evidence relied upon in Section 3.1 to demonstrate that humanitarian demining is “essential to the survival of the civilian population” is equally relevant in showing that humanitarian demining is *prima facie* compliant with the principle of humanity; its sole purpose is to respond to the humanitarian needs of affected populations by protecting them from the indiscriminate effects of abandoned anti-personnel mines and clearing access for the delivery of other forms of essential humanitarian aid. The fact that children are disproportionately affected by mines and that mine clearance is a prerequisite for accessing other forms of aid justifies its prioritisation in accordance with the principle of humanity.

It should be noted that the principle of humanity is not violated where an impartial humanitarian organisation is unable to access those persons in greatest need due to external factors outside its control. Where the affected State or territorial authority has denied access, an impartial humanitarian organisation should still continue to negotiate in order to deliver those supplies and services to those in need. However, it would run contrary to purpose and practicality of IHL if that organisation were precluded from prioritising those communities with the greatest need to which they could actually obtain access and deliver life-saving humanitarian assistance.

5.2 Impartiality

Where humanitarian demining is executed solely on the basis of humanitarian need without adverse discrimination on the basis of nationality, race, gender, religious belief, class or political opinion, it is compliant with the principle of impartiality. There is nothing inherent to humanitarian demining that would prevent compliance with the principle of impartiality. If the relevant organisation conducts appropriate survey techniques to ensure that humanitarian demining is directed at those population with the greatest need and is committed to delivering its services without adverse distinction, humanitarian demining will satisfy the principles of humanity and impartiality.

However, impartiality is often the result of the commitment that the organisation has to the

principles of neutrality and independence. Where an organisation has taken steps to ensure that its activities will not provide a definite military advantage, and has obtained access by demonstrating its commitment to alleviating human suffering to the exclusion of political goals and its operational independence from any political entity, that organisation will generally have the necessary capacity and trust of the affected State or territorial authority to conduct its services in accordance with the principle of impartiality. Accordingly, when considering the principles of neutrality and independence, even where their nature is more operational than legally-proscribed, it is worth taking into account whether compliance with these principles is in fact necessary to ensure compliance with impartiality – remembering that impartiality is a prerequisite to the legal definition of humanitarian assistance.

5.3 Neutrality

The principle of neutrality imposes two criteria for the provisions of humanitarian assistance:²³⁷

1. Humanitarian assistance must not amount to an engagement in the hostilities by providing a definite military advantage to a party to the conflict (neutrality as the obligation not to provide a definite military advantage); and
2. Humanitarian assistance must be exclusively humanitarian and should not engage in controversies of a political, religious, or ideological nature (neutrality as non-politicisation).

Neutrality as the obligation not to provide a definite military advantage has a firm basis in

237. Daniel THURER, “Dunant’s Pyramid: Thoughts on the ‘Humanitarian Space’”, *International Review of the Red Cross*, Vol. 89, No. 865 (March 2007), <https://international-review.icrc.org/sites/default/files/irrc-865-3.pdf>, p. 58 (“The principle of neutrality imposes two obligations on neutral parties: (i) maintaining a distance from the hostilities, that is abstaining from actions that would help or hinder one party or the other; and (ii) taking no part in political, racial, religious or ideological controversy.”) See also: Humanitarian Practice Network, *Humanitarian Exchange*, No. 25, HPG-ODI, London (December 2003), <https://odihpn.org/wp-content/uploads/2003/12/humanitarianexchange025.pdf>, p. 1 (In fact notes three components of neutrality in humanitarian assistance; (i) the public position adopted by the organisation, (ii) the actual effect on the parties to the conflict, and (iii) the perceptions of the organisation’s neutrality. However, the first and third can be taken together).

IHL and can be understood as a prerequisite for defining humanitarian activities as “humanitarian assistance” under this body of law.²³⁸ Where an organisation purporting to deliver humanitarian assistance is providing a definite military advantage to a party to the conflict, it gives the affected State or territorial authority a legitimate reason to refuse or suspend assistance programs and can amount to a hostile act or an unlawful interference in the sovereign affairs of the State.

Neutrality as non-politicisation is predominantly an operational tool to help ensure compliance with the fundamental principles of humanity and impartiality and obtain the consent of the State or territorial authority to access to affected populations. While humanitarian aid should be non-political, it is often impossible for it to be completely separated from concurrent political objectives or the perception of bias, particularly during complex emergencies involving multi-mandated UN agencies. Accordingly, politicisation does not necessarily mean that the organisation is not impartial or incapable of delivering humanitarian assistance under IHL.

However, if politicisation negatively impacts on an organisation’s commitment to humanity and impartiality, its activities are unlikely to qualify as “humanitarian assistance” under IHL.

Finally, neutrality in post-conflict situations assumes lesser importance as there are no longer opposing parties to the conflict and no risk of providing a military advantage. However, non-politicisation remains an important means of ensuring compliance with the principles of humanity and impartiality.

5.3.1 Neutrality as the obligation not to provide a definite military advantage

IHL explicitly provides for the obligation not to provide a definite military advantage in the delivery of humanitarian assistance. Article 23(c) of GC IV

states that the obligation to permit free passage of humanitarian goods only applies if the party to the conflict “is satisfied that there are no reasons for fearing ... that a military advantage may accrue to the military efforts or economy of the enemy”.²³⁹ Article 70(1) of AP I states that “relief actions which are humanitarian and impartial in character and conducted without any adverse distinction ... shall not be regarded as interference in the armed conflict or as unfriendly acts”. This provision demonstrates that the scope of “humanitarian assistance” under IHL excludes conduct that would provide a definite military advantage to a party to the conflict, as such conduct would, by definition, amount to an interference in the conflict and an unfriendly act. Similarly, Article 3(2) of AP II states that “[n]othing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs”. Impartial humanitarian organisations delivering humanitarian assistance in accordance with Article 18(2) of AP II are therefore prohibited from providing a definite military advantage to a party to the conflict, as such conduct would, again, clearly amount to an intervention in the conflict.

It is important to note that humanitarian assistance will invariably provide some benefit to a party to the conflict.²⁴⁰ The obligation of neutrality is limited to the prohibition on providing a definite military advantage. When applied to humanitarian demining, indirect benefits, such as improved political standing or relations with the civilian population, are not sufficient to violate the neutrality principle. Rather, the obligation of neutrality is to ensure that humanitarian demining operations and equipment do not enable the effective movement of troops for combat, deprive a party to the conflict of a legitimate means of targeting the enemy, or otherwise provide assistance that is likely to lead to a definite military advantage. Contrary to the implication of some authors,²⁴¹ humanitarian demining is essential

238. Denise PLATTNER, “ICRC Neutrality and Neutrality in Humanitarian Assistance”, *International Review of the Red Cross* (1996), No. 311, <https://www.icrc.org/en/doc/resources/documents/article/other/57jn2z.htm>, stating: “Neutral assistance is assistance whose validity is grounded in international humanitarian law. ...Moreover, neutrality is regarded as a principle of humanitarian law, which implies inter alia that ‘humanitarian assistance is never interference in a conflict.’”

239. Art. 23(c) of GC IV.

240. ICRC, *Commentary of 1958*, p. 182.

241. Robert KEELEY, “Improvised Explosive Devices (IED): A Humanitarian Mine Action Perspective”, *Journal of Conventional Weapons Destruction*, Vol. 21, Issue 1, art. 3 (2017), <https://commons.lib.jmu.edu/cisr-journal/vol21/iss1/3>.

during an armed conflict to protect civilians from the indiscriminate effect of mines and to facilitate other essential humanitarian aid.²⁴²

However, it is accepted that, due to the nexus between demining activities and military objectives, humanitarian demining poses a special risk to the principle of neutrality.²⁴³ The party to the conflict that is facilitating the demining operation could use humanitarian demining to further its military objectives and deprive the opposing side of a definite military advantage. However, it is submitted that where humanitarian demining organisations limit their activities to the removal of abandoned anti-personnel mines from civilian-populated areas, away from the conduct of hostilities, they do not provide a definite military advantage. Three, mutually reinforcing arguments are presented in support of this conclusion:

1. It can be argued that since the mines are “abandoned” and no longer serving a military purpose, their removal does not provide a “definite military advantage” to the party on whose territory the mines are removed or deprive such an advantage from the party who laid the mines.
2. Moreover, it can be argued that where the presence of such mines can only have an “indiscriminate effect on civilians” their removal, whether with the assistance of the humanitarian community or not, does not provide a military advantage as it is simply a means of complying with that State’s obligation under customary IHL to limit the indiscriminate effects of mines.
3. Finally, and in addition, where abandoned mines will have an indiscriminate effect or have been laid in a deliberate attempt to target

242. The necessity of humanitarian demining during the conflict was recognised in the UNSG 2018 Report, para. 54. (For example, humanitarian demining was essential during the conflict in Afghanistan: see GICHD, *Mine Action: Lessons and Challenges* (2005), op. cit., p. 210); and in Ukraine: Henrike GARBINO, “Ukraine’s Newly Adopted Mine Action Law: What Does This Mean for HMA Programs?” *Journal of Conventional Weapons Destruction*, Vol. 23, Issue 1, art. 7 (April 2019), <https://commons.lib.jmu.edu/cisr-journal/vol23/iss1/7>, pp. 13, 19).

243. Leader (2000), p. 41. (Noting that capacity-building risks violating the principle of neutrality where it improves the capacity of that party to continue participating in the armed conflict. Demining poses a special risk in this regard, as the relevant party would be able to operate free from mines and also increases technical expertise in demining).

civilians, their removal is not to be considered as an engagement in hostilities or as providing a definite military advantage. The UN Security Council has stated that action taken to prevent a violation of IHL’s core rules, such as the prohibitions on attacking on civilians or obstructing humanitarian aid, shall not be regarded as an interference in the conflict or a violation of the principle of neutrality.

Each of these arguments is premised on the requirement that humanitarian demining organisations limit their activities to areas where anti-personnel mines have been abandoned in civilian-populated areas, away from the conduct of hostilities, so as to ensure that their removal is not providing a military advantage to a party to the conflict.

5.3.1.1 Abandoned anti-personnel mines in civilian-populated areas away from the conduct of hostilities do not serve a military objective

It will be recalled that humanitarian demining, as a legal concept, is distinct from military demining in several important ways. Most significantly, humanitarian demining must serve a humanitarian, non-military purpose. In the context of armed conflict, it is designed to protect civilian life from the indiscriminate effects of mines, improve civilian well-being, and facilitate the delivery of essential humanitarian aid, such as food, water, and medical supplies. Humanitarian demining does not tolerate casualties and requires the removal of all mines so as to ensure that the area is safe for civilians. It is therefore painstakingly slow and impossible to conduct in areas of active hostilities where the threats to deminer personnel would be unacceptably high. Demining areas of active hostilities so as to facilitate the movement of troops or protect military personnel is fundamentally at odds with the definition and purpose of humanitarian demining and would require equipment and training that is not possessed by humanitarian deminer personnel. As stated by one commentator, humanitarian demining operations “are neither intended nor equipped to deploy full security cordons or engage defensively”.²⁴⁴

244. Craig MCINALLY and Hans RISSER (Norwegian People’s Aid) “Humanitarian Mine Action and IEDs”, *Journal of Conventional Weapons Destruction*, Vol. 21, Issue 3 (November 2017), pp. 30-34, <https://commons.lib.jmu.edu/cgi/viewcontent.cgi?article=2802&context=cisr-journal>, p. 32. See also: James

Accordingly, the obligation not to provide a definite military advantage to a party to the conflict is already contained within the definition and inherent limitations of humanitarian demining as a legal concept. Furthermore, many of these factors will be implemented by practical necessity, as the safety of humanitarian deminer personnel will require that operations are conducted away from the conduct of hostilities.

Nevertheless, it is worth reiterating these essential components of humanitarian demining when examining it as a form of humanitarian assistance in compliance with the principle of neutrality. Humanitarian demining organisations must ensure that the mines are abandoned; that is, they are no longer an active means of targeting the opposing armed force.²⁴⁵ This consideration will invariably be one of fact and degree. Where civilians have returned or are attempting to resume ordinary life and there is no longer a military presence or likelihood of a return to active hostilities in the particular area, it is likely that the mines may be considered “abandoned” and their removal as serving a humanitarian, non-military purpose.

5.3.1.2 Removing abandoned anti-personnel mines from civilian-populated areas is necessary to comply with the obligation to limit the indiscriminate effect of mines

All parties to an armed conflict are under an obligation not to use indiscriminate weapons or launch indiscriminate attacks.²⁴⁶ Specific to the legal regulation of mines, all parties to a conflict are under an obligation to limit their indiscriminate effects.²⁴⁷ The obligation to limit the indiscriminate effects of mines is codified in *Protocol II to the 1980 Convention on Conventional Weapons*, which currently has 125 States party. According to

Rule 81 of the ICRC’s Customary IHL Study, this obligation is applicable in both international and non-international armed conflicts. State practice supports this conclusion.

In addition to codifying the prohibition on the indiscriminate use of all mines,²⁴⁸ *Protocol II to the Weapons Conventions* prohibits the use of anti-personnel mines that are not detectable;²⁴⁹ prohibits the use of non-self-destructing and non-self-deactivating mines outside fenced, monitored and marked areas;²⁵⁰ obliges parties to the conflict to remove mines under their control, without delay after the cessation of active hostilities;²⁵¹ and requires parties to take all feasible precautions to protect civilians from the effects of these weapons.²⁵² In 1993, *Protocol II* was amended to extend its scope to NIACs, a move the ICRC labelled “not controversial”.²⁵³ The amended *Protocol II* currently counts 106 States Parties. Moreover, the UN General Assembly and Security Council have consistently expressed concern at the humanitarian impact of mines and called upon States to protect civilians and facilitate humanitarian access, irrespective of the whether the conflict is classified as international or non-international.²⁵⁴

Of particular significance is the fact that 164 States have ratified the Anti-Personnel Mine Ban Treaty, recognising the indiscriminate and disproportionate effect that anti-personnel mines have on civilians. States party to the Anti-Personnel Mine Ban Treaty are obliged: never under any circumstances to use anti-personnel mines and to ensure that no one uses them in its territory;²⁵⁵ never under any circumstances to “develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;”²⁵⁶ to destroy all stockpiled anti-personnel mines under their control within

TREVELYAN, “Research Challenges”, in Maki K. Habib (ed), *Humanitarian Demining*, Intech Open (2008), https://www.intechopen.com/books/humanitarian_demining/.

245. It should be noted that an active mine intended for and still with the reasonable potential of targeting the opposing armed force is distinct from the use of mines to indiscriminately target anyone who may be opposed to the party to the conflict who laid the mines. For example, ISIS’ claim that the “enemy” is anyone who has not subscribed to its particular ideology is not legitimate under IHL.

246. Rules 71 and 11 of the ICRC Study on Customary IHL.

247. Rule 81, *ibid*.

248. Art. 3(8) of *Protocol II to the Weapons Convention*.

249. Art. 4 of *Protocol II to the Weapons Convention*.

250. Arts. 5 and 6 of *Protocol II to the Weapons Convention*.

251. Art. 10 of *Protocol II to the Weapons Convention*.

252. Art. 3(10) of *Protocol II to the Weapons Convention*.

253. Rule 81 of the ICRC Study on Customary IHL.

254. Previously noted UNGA and UNSC Resolutions on mine action.

255. Art. 1(1)a of the *Anti-Personnel Mine Ban Treaty*.

256. Art. 1(1)b of the *Anti-Personnel Mine Ban Treaty*.

4 years;²⁵⁷ and to clear all mined areas within 10 years.²⁵⁸

Due to the contrary State practice of certain non-member States, it cannot be said that anti-personnel mines are prohibited under customary international law. However, non-member States accept the obligation to limit their indiscriminate effects and seem to acknowledge the necessity of an absolute prohibition at some point in the future. In the Final Declaration adopted by consensus at the Second Review Conference, States party to the *Convention on Certain Conventional Weapons* “solemnly declare[d] ... their conviction that all States should strive towards the goal of the eventual elimination of anti-personnel landmines globally”.²⁵⁹ The ICRC also notes that States party to the *Ottawa Convention on Anti-Personnel Mines* adopted a Declaration calling upon States still using or possessing anti-personnel landmines to ‘cease now’.²⁶⁰ Together, this practice indicates the emergence of a customary norm prohibiting anti-personnel mines and serves as further proof that States: (a) recognise the indiscriminate and often disproportionate effect of anti-personnel mines on civilians; (b) are obligated to limit their discriminatory effects; and (c) are prohibited from using mines in an indiscriminate manner. As confirmed by the UN Security Council in unanimously adopting Resolution 2365 on Mine Action, parties to armed conflict are obliged to “end immediately and definitively any indiscriminate use of explosive devices in violation of international humanitarian law”.²⁶¹

Irrespective of whether the mines were laid in violation of IHL or not, the ongoing presence of unmarked, abandoned anti-personnel mines and IEDs in civilian-populated areas, outside the conduct of active hostilities, renders the effect of such weapons indiscriminate. The removal of anti-personnel mines in this context is therefore a necessary means of complying with obligation

under customary IHL to limit the indiscriminate effect of mines. Compliance with this obligation cannot be viewed as providing a definite military advantage to the party from whose territory the mines are removed; rather, it is to protect civilians from the indiscriminate effect of mines and facilitate essential humanitarian aid. Removing mines in this context therefore complies with the principle of neutrality.

5.3.1.3 Taking action to prevent a violation of IHL's core rules does not constitute and engagement in hostilities or provide a definite military advantage

In addition to the arguments presented above, it is submitted that actions taken to protect civilians from a violation of IHL that do not involve the use of force, such as removing indiscriminate anti-personnel mines or booby traps, cannot be interpreted as providing a definite military advantage to a party to the conflict. The reason is that such conduct does not deprive a party to the conflict of a lawful military objective and therefore does not provide an unfair advantage to the opposing side.

The practice of the UN Security Council supports this conclusion. Despite the terminological inconsistency with which the UN has applied the concepts of “neutrality” and “impartiality”,²⁶² its position with respect to its peacekeeping forces is that action taken to protect civilians from serious violations of IHL and IHRL, when applied equally to all parties to the conflict, is consistent with its obligations of impartiality and neutrality.²⁶³ As stated in the Report of the panel on United Nations Peace Operations (the “Brahimi report”) in 2000, “[i]mpartiality for the United Nations must mean adherence to the principles of the Charter and to

257. Art. 4 of the Anti-Personnel Mine Ban Treaty.

258. Art. 5(1) of the Anti-Personnel Mine Ban Treaty.

259. Rule 81 of the ICRC Study on Customary IHL.

260. Ibid.

261. UNSC Resolution 2365 (30 June 2017), para.2.

262. For example, see: Trevelyan (2008), op. cit.; Hikaru YAMASHITA, “‘Impartial’ Use of Force in United Nations Peacekeeping”, *International Peacekeeping*, Vol.15, No.5 (November 2008), pp.615–630, https://is.muni.cz/el/fss/podzim2016/EUP420/um/03_Impartial_Use_of_Force_in_United_Nations_Peacekeeping.pdf.

263. Winrich KUHNE, “From Peacekeeping to Postconflict Peacebuilding”, in Luc REYCHLER and Thania PAFFENHOLTZ (eds), *Peacebuilding; A Field Guide*, London (2001), pp. 376-389, cited by A.M. JOHANNES, “Neutrality and Impartiality of the United Nations Peacekeeping Operations”, (12 June 2007), <http://amjohannes.wikidot.com/neutrality-and-impartiality-of-the-united-nations-peacekeepi>. (“For example, in cases where the UN operation is using force against one side of the conflict in order to prevent mass murder, rape, ethnic cleansing or genocide, it is regarded as not acting impartially, but as simply acting according to the mandate”).

the objectives of a mandate that is rooted in those Charter principles”, explaining that the UN must take action to prevent violations of international law.²⁶⁴ Parties that have consented to the presence of UN peacekeepers are understood to have consented to the UN’s role in suppressing serious violations of international law. As stated by one commentator:

*In several recent instances the UN Security Council has authoritatively confirmed the absolute impermissibility of certain activities of parties to the conflict. They include ethnic cleansing, genocide, attacks on civilians and the denial of humanitarian assistance and medical aid. Insistence on compliance with these requirements, even through the use of force, can never be an unneutral or partial act.*²⁶⁵

The author uses the example of the conflict in the former-Yugoslavia in which the express military strategy of the Bosnian-Serbs was to commit ethnic cleansing against the civilian population. Despite acknowledging that the Security Council undermined its neutrality and impartiality in other ways, he argues that its willingness to protect the core rules of IHL against all possible violators meant that it was not acting partially, while suppressing the policy of ethnic cleaning “was not depriving the Bosnian Serbs of a lawful means of warfare” and therefore could not be described as “unneutral”.²⁶⁶

It should be noted that the dominant position is that any peace enforcement action taken by the Security Council is incapable of being regarded as truly neutral and that, under IHL, any direct engagement in the conduct of hostilities will render UN forces party to the conflict. Accordingly, using force to protect civilians from IHL violations does not comply with the principle of neutrality and

cannot be considered a form of humanitarian assistance. However, the practice of the UN with regards to protecting civilians from serious violations of IHL demonstrates that such conduct cannot be viewed as depriving a party of a definite military advantage, as that would legitimise a military objective that is inherently unlawful, such as directing attacks against civilians. Removing indiscriminate mines and booby traps therefore does not deprive a party of a definite military advantage, as such weapons are equally unlawful under IHL. Providing the removal of abandoned anti-personnel mines is conducted without force or coercion, it may be considered a form of humanitarian assistance in compliance with the principle of neutrality.

Although there is no precise definition under IHL,²⁶⁷ an indiscriminate weapon may be defined as: (a) a weapon that is incapable of being targeted at a military objective; or (b) a weapon whose effects cannot be limited as required by international humanitarian law.²⁶⁸ The indiscriminate effects of certain anti-personnel mines and IEDs cannot be limited so as to comply with IHL. Although the term “IED” technically refers to how the weapons is made rather than its inherent effects, the conversion of ordinary civilian objects into victim-activated IEDs (such as plastic bottles or other household items) that are designed to be left in civilian environments may be classified as an indiscriminate weapon because its effects cannot be limited as required by IHL.²⁶⁹ Reports from both the Secretary General to the UN General Assembly and Security Council have labelled IEDs as indiscriminate.²⁷⁰ Disguising an IED as a civilian object and leaving it in a civilian-populated area could also amount to a violation of the principle of distinction by intentionally targeting civilians or a violation of the customary prohibition on booby-traps “likely to attract civilians”.²⁷¹ Indeed, the International Mine Action Standards (IMAS) define a booby-trap as “[a]n explosive or non-explosive device, or other

264. UNGA, Report of the Panel on United Nations Peace Operations, A/55/305 (21 August 2000), <https://undocs.org/A/55/305> (hereafter Brahimi Report), p. 9, para. 50.

265. Marc WELLER, “The Relativity of Humanitarian Neutrality and Impartiality”, *The Journal of Humanitarian Assistance* (1998), <https://sites.tufts.edu/jha/archives/119>.

266. *Ibid.* See also: UNGA, Report of the Secretary General pursuant to General Assembly Resolution 53/35 - The Fall of Srebrenica, A/54/549 (15 November 1999), https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_549_1999.pdf, p. 38-39 (Noting that the mandate of UN Peacekeeping forces includes humanitarian protection).

267. Note discussion on Rule 71 of the ICRC Study on Customary IHL, regarding military manuals, submissions to the ICJ in the Nuclear Weapons Case, etc.

268. Based on Art. 51(4)(c) of AP I, which is considered part of the definition of an indiscriminate attack in Rule 12 of the ICRC’s Study on Customary IHL.

269. *Ibid.*

270. UNSG 2017 Report, para. 12; UNSG 2018 Report, para. 53.

271. Rule 80 ICRC Study on Customary IHL.

material, deliberately placed to cause casualties when an apparently harmless object is disturbed or a normally safe act is performed”.²⁷²

Similarly, it could be argued that all unmarked and abandoned anti-personnel mines and IEDs in civilian-populated areas outside the conduct of hostilities have become indiscriminate weapons, given that there is no longer any means for the party who laid the mine to limit their effects on civilians. In such contexts, removing anti-personnel mines and IEDs does not deprive a party to the conflict of a lawful military objective and therefore cannot be understood as providing or depriving a party of a definite military advantage. Contrary to the opinion of some authors who have argued, for example, that removing indiscriminate mines left by ISIS in Afghanistan would provide a “political advantage” and therefore violate the principle of neutrality,²⁷³ it is submitted that any such advantage is incidental and does not amount to a “definite military advantage” under IHL. Humanitarian demining in this context is a means of protecting civilians from violations of IHL’s core rules and is therefore compliant with the principle of neutrality.

5.3.2 Neutrality as non-politicisation

This subsection considers some of the factors relevant to political neutrality and the extent to which they may affect humanitarian demining operations. The classical position is that aid should be distinct from developmental goals or any other activity that is seeking to achieve a political solution. However, this distinction is not always realistic in practice, especially where humanitarian assistance (including demining) is coordinated by the UN, which is an inherently political institution. Humanitarian demining conducted by UNMAS should therefore be considered humanitarian assistance under IHL despite political affiliation with the UN and its broader development goals, providing UNMAS is able to comply with the principles of humanity and impartiality by prioritising its services on the basis of humanitarian need without adverse distinction. The ability of

UNMAS to fulfil this requirement and not have its priorities subsumed by conflicting political mandates is also central to the fundamental principle of operational independence, which is discussed in the next subsection.

5.3.2.1 Political neutrality to obtain access

Neutrality in terms of the non-politicisation of humanitarian assistance is predominantly an operational principle that is necessary to obtain the consent of the affected State or territorial authority to access persons in need. Offers of humanitarian assistance that are perceived as a form of political interference in the sovereign affairs of the State or as a means of providing an unwanted political solution to the conflict are unlikely to be accepted. Political neutrality is therefore often necessary to gain humanitarian access to affected populations and fulfil the underlying purpose of humanitarian assistance. As stated by the UN High Commissioner for Refugees, Mrs. Sadako Ogata: “Neutrality means more than being even handed, it means being independent from political goals and considerations. This is the essence of what I would call “humanitarian space”. The pursuit of humanitarian space requires negotiations to obtain consent”.²⁷⁴

Perceived lack of neutrality can result in restrictions on the movement of relief organisations. The Council of Europe estimates that from 2012 to 2018 more than 60 countries have either passed or drafted laws restricting the activities of civil society organisations.²⁷⁵ Whether a humanitarian organisation’s political motivations or affiliations result in the denial of entry will depend on the circumstances of the particular case, but it should be recalled that purpose of humanitarian assistance is not to achieve political change or condemn violence; it is to save lives and protect human dignity. As stated by one commentator, humanitarian organisations “should not make any pronouncement on whether a war is just or unjust, as this would undermine their ability to access

272. IMAS, Standards & Technical Notes, op. cit. “Glossary of mine action terms, definitions and abbreviations”, p. 9, 3.25.

273. Keeley (2017), p. 4 (“[A]n NGO that clears active IEDs is effectively taking part in the wider counterinsurgency”).

274. UNHCR, Keynote Address by Mrs. Sadako Ogata (1994), op. cit.

275. Council of Europe, Commissioner for Human Rights, “The Shrinking Space for Human Rights Organisations” Human Rights Comments, Strasbourg (4 April 2017), <http://www.coe.int/en/web/commissioner/-/the-shrinking-space-for-human-rightsorganisations>.

vulnerable groups and address needs ... [n]eutrality is not an end in itself; it is a means of fulfilling the humanitarian imperative".²⁷⁶

With respect to humanitarian demining, it has been suggested that demining services should be offered to both parties to the conflict, usually during a ceasefire or period of relative stability, so as to demonstrate political neutrality and obtain safe access to affected communities.²⁷⁷

5.3.2.2 Political neutrality to comply with the principles of humanity and impartiality

Once access is granted, political neutrality is often necessary to ensure compliance with the other fundamental principles of humanity and impartiality.²⁷⁸ In other words, if the political motivations or affiliations of an impartial humanitarian organisation result in aid being delivered to areas most likely to support a particular political solution rather than on the basis of humanitarian need, it will have violated the principles of humanity and impartiality and cannot be classified as humanitarian assistance under IHL. The principle of political neutrality is therefore one of fact and degree. Humanitarian organisations must ensure that any political or developmental motivations are subservient to humanitarian principles, not the other way around.

The issue of political affiliation has arisen with respect to the localisation of humanitarian aid. While placing power in the hands of local actors has led to improved humanitarian access and is generally encouraged,²⁷⁹ humanitarian organisations must ensure that they are not prioritising their own connections with local actors over other communities that might be in greater objective need of assistance.²⁸⁰

276. Antonio DONINI, "Between a Rock and a Hard Place: Integration or Independence of Humanitarian Action?" *International Review of the Red Cross*, Vol. 93, No. 881 (2011), <https://www.icrc.org/en/doc/assets/files/review/2011/irrc-881-donini.pdf>, p. 155.

277. UNHCR, *Handbook for the Military on Humanitarian Operations* (January 1995), <https://www.unhcr.org/en-au/publications/legal/3d5122884/unhcr-handbook-military-humanitarian-operations.html>, Chapter 5.3.

278. Hugo SLIM, *Humanitarian Ethics. A Guide to the Morality of Aid in War and Disaster*, London: Hurst & Co. (2015), <https://www.tandfonline.com/doi/pdf/10.1080/09557571.2016.1271189>, p. 65.

279. World Humanitarian Summit, *Charter for Change: Localisation of Humanitarian Aid* (July 2015, revised February 2019) <https://charter4change.org/>.

280. *Ibid.* See also: Ed SCHENKENBERG, "The Challenges of

Apart from the issue of subsuming humanitarian assistance within the political/military objectives of UN peacekeeping, which is discussed below, the main source of tension with the politicisation of humanitarian aid is the tendency to conflate humanitarian assistance with developmental assistance and structural change, as well as the human rights tradition of making public condemnations.²⁸¹ The classical position is therefore that humanitarian assistance is distinct from development or any other activity that is seeking to achieve a political solution. However, this distinction is not always realistic in practice, especially where humanitarian assistance is coordinated or supported by the UN, which is an inherently political institution. Political neutrality is therefore an operational principle that must be adapted to the particular context. Providing that any association with political or development goals does not impact upon the organisations commitment to delivering aid on the basis of humanitarian need without adverse distinction, it may still be classified as humanitarian assistance under IHL.

With respect to humanitarian demining conducted by UNMAS in collaboration with other UN agencies in the context of armed conflict, special care must be taken to ensure that prioritisation of demining services is based on humanitarian need and not on broader political or development goals.

5.3.2.3 Political neutrality and UN peacekeeping forces

The single most challenging test to the political neutrality of humanitarian assistance is association and collaboration with UN peacekeeping forces or militaries. The ICRC notes that in the earlier stages of what is now referred to as "traditional peacekeeping", the UN emphasised consent, cooperation and the non-use of force, except in self-defence. These missions tended to include "monitoring or supervising cease-fire or armistice agreements in the context of international armed conflicts, observing frontier lines, acting as a buffer between belligerents and assisting in troop withdrawals, monitoring or even running

Localised Aid in Armed Conflict", MSF Emergency Gap Series 03 (1 November 2016), file:///C:/Users/IHL-Legal%20Advisor/Downloads/msf-egs03-the-challenges-of-localised-humanitarian-aid-in-armed-conflict-.pdf.

281. Leader (2000), p. 7.

elections” and were largely welcomed by the ICRC as “distinct from and complementary to humanitarian activities”.²⁸² However, contemporary peacekeeping operations have tended to blur the line between humanitarian assistance and political objectives, and between the concepts of peace keeping and peace enforcement. Peacekeepers are at times directly involved in the provision of humanitarian aid and their mandates may simultaneously include a licence to use force to ensure that it is delivered.

In situations where aid is being delivered without the consent of the State or territorial authority, or where security has otherwise deteriorated to the point where humanitarian organisations are at risk, collaboration with protective UN peacekeeping forces or militaries is sometimes viewed as a practical necessity.²⁸³ Militaries provide certain resources and unique capabilities that can assist in delivering humanitarian aid, such as “specialised airlift capacities, maritime resources, reconnaissance and intelligence capacities, the ability to rapidly arrange effective communications networks, and the technology to deal with nuclear, biological and chemical threats”.²⁸⁴ Moreover, they can provide physical and psychological security to humanitarian personnel.²⁸⁵

However, military collaboration carries inherent risks to the mission and to the lives of both humanitarian and military personnel and should only be viewed as a last resort.²⁸⁶ As noted in the UNHCR’s Handbook for the Military on Humanitarian Organisations, “[a]ggressors tend not to differentiate between convoys and their escorts, and may therefore target unarmed humanitarian workers”.²⁸⁷ In an independent Study commissioned by the UN

Integration Steering Group, humanitarian actors identified association with certain political entities or the “politicisation of assistance” as the primary cause of attacks, which was confirmed by analysts as one of multiple causes of violence directed at humanitarian personnel.²⁸⁸

Beyond the inherent risks of direct collaboration with militaries, mere association with UN peacekeeping forces can undermine the actual or perceived political neutrality of the humanitarian assistance and negatively impact upon the organisation’s compliance with the principles of humanity and impartiality.²⁸⁹ Association has caused local populations to perceive humanitarian assistance as conditional upon their acceptance of a UN-led peace-building initiative or political solution.²⁹⁰ While perceptions of neutrality are impossible to fully control, especially given the realities of working in collaboration with UN and the difficulty in explaining the separation of particular mandates,²⁹¹ associations with UN peacekeeping has also led to actual compromises of political neutrality of humanitarian assistance. Several NGOs and UN aid workers have claimed that the UN’s policy of integration has “subjugated humanitarian prerogatives to broader political goals”.²⁹² Commentators have argued that this process has caused humanitarian organisations to have their “sphere of responsibility to be defined by political and security considerations rather than by the acuteness of need and the humanitarian imperative to save and protect lives”.²⁹³

For organisations providing humanitarian assistance, both obtaining access and maintaining effective compliance with the principles of humanity and impartiality on the ground require

282. Cornelio SOMMARUGA, “Humanitarian action and peacekeeping operations”, Keynote address by the President of the ICRC at the Conference on Humanitarian Action and Peacekeeping Operations, Singapore (February 1997) International Review of the Red Cross, No. 317 (April 1997) <https://www.icrc.org/en/doc/resources/documents/article/other/57jnj7.htm>.

283. *Ibid.*

284. OECD, Civilian and Military Means of Providing and Supporting Humanitarian Assistance During Conflict: A Comparative Analysis, DCD/DAC(97)19 (September 1997), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC\(97\)19&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DCD/DAC(97)19&docLanguage=En), para. 4.

285. UNHCR, Handbook for the Military (1995), Chapter 6.2.

286. OECD (1997), *op. cit.*, para. 77.

287. UNHCR, Handbook for the Military (1995).

288. Victoria METCALFE, Alison GIFFEN and Samir ELHAWARY, “UN Integration and Humanitarian Space: An Independent Study Commissioned by the UN Integration Steering Group”, A Report of the Humanitarian Policy Group – Overseas Development Institute (December 2011), <https://www.unocha.org/sites/unocha/files/dms/Documents/FINAL%20Integration%20humanitarian%20space%20study%20Dec11.pdf>, p. 26.

289. OECD (1997), *op. cit.*

290. UNHCR, Handbook for the Military (1995), Chapter 5.1.

291. UNOCHA News and Updates, “Humanitarian Issues: Integrating peacekeeping and humanitarian work – how to make it work?” (10 January 2012), <https://www.unocha.org/story/humanitarian-issues-integrating-peacekeeping-and-humanitarian-work-%E2%80%93-how-make-it-work>.

292. *Ibid.*

293. Donini (2011), *op. cit.*, p. 155.

a certain degree of political neutrality. Where humanitarian assistance is perceived as political interference, access is likely to be refused. Where humanitarian priorities are subsumed by broader political or development goals, it is likely to lead to a violation of the principles of humanity or impartiality. It is therefore not surprising that a 2011 study conducted commissioned by the UN Office for the Coordination of Humanitarian Affairs (UNOCHA) concluded that “the most successful humanitarian agencies in highly insecure environments are those that prioritise acceptance by all relevant stakeholders, including the population, through sustained humanitarian dialogue and *strict respect of the humanitarian principles of impartiality, independence, and neutrality*.”²⁹⁴

UNMAS often conducts humanitarian demining alongside UN peacekeeping operations. Perceptions of compromised political neutrality may at times be unavoidable. What becomes critical is that UNMAS has sufficient operational independence so that it can prioritise its activities on the basis of humanitarian need in accordance with the fundamental principles of humanity and impartiality. Its activities, if properly defined as humanitarian assistance and benefiting from IHL’s regulation, must not be subordinate to the broader political or development goals of the UN.

5.3.3 Neutrality and post-conflict humanitarian demining

Finally, it is worth reiterating that humanitarian demining often takes place in a post-conflict context where it is easier to establish compliance with the principle of neutrality. While post-conflict humanitarian demining operations must still ensure that they do not take sides in controversies of a political, religious or ideological nature, there are no longer opposing military factions for whom demining might provide a military advantage. In the post-conflict context, humanitarian demining operations may even collaborate with militaries to achieve their humanitarian objectives. However, a post-conflict context may still be politically volatile and a defeated party to the conflict may still be

in a position to carry out isolated attacks, as was the case when Iraq defeated ISIS on its territory on 10 December 2017 but the latter continued to use ‘pop-up tactics’ and killings that disrupted humanitarian demining operations.²⁹⁵ Special care must always be taken to ensure the safety of humanitarian deminers and in certain post-conflict political environments it may be inappropriate for humanitarian demining operations to act in collaboration with militaries.

IHL may still regulate humanitarian assistance in post-conflict situations, as certain rights and obligations under IHL continue after the end of the conflict. For example, Article 2(2) of Additional Protocol II continues to protect persons whose liberty has been restricted for reasons relating to the conflict. The ICRC’s updated Commentary on Article 3 states that, “[t]he guarantees of common Article 3 – binding State and non-State Parties alike – can be of vital importance for the victims of a non-international armed conflict even after the conflict as such has come to an end”.²⁹⁶ And further: “Persons protected under common Article 3, even after the end of a non-international armed conflict, continue to benefit from the article’s protection as long as, in consequence of the armed conflict, they are in a situation for which common Article 3 provides protection”.²⁹⁷ Specific to the provision of humanitarian assistance, the Commission of Experts convened by the ICRC in 1962 to study the question of humanitarian aid to victims of internal conflicts concluded that, following the end of armed conflict, the provisions of Common Article 3 “remain applicable to situations arising from the conflict and to the participants in that conflict”.²⁹⁸

294. Jérémie LABBÉ and Arthur BOUTELLIS, “Peace Operations by Proxy: Implications for Humanitarian Action of UN Peacekeeping Partnerships with Non-UN Security Forces”, *International Review of the Red Cross*, Vol. 95, No. 891/892 (2013), pp. 539–559, <https://international-review.icrc.org/sites/default/files/irrc-891-892-labbe-boutellis.pdf>, p. 552.

295. Pehr LODHAMMAR, “How Iraq Is Changing What We Do: Measuring Clearance in Urban Environments”, *Journal of Conventional Weapons Destruction*, Vol. 22, Issue 2, art. 5 (August 2018), <https://commons.lib.jmu.edu/cisr-journal/vol22/iss2/5>.

296. ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd edition (2017), <https://ihl-databases.icrc.org/ihl/full/GCII-commentary> (hereafter ICRC Commentary of 2017), para. 522; David P. FORSYTHE, “International Humanitarian Assistance: The Role of the Red Cross”, *Buffalo Journal of International Law*, Vol. 3, No. 2 (1997), <https://digitalcommons.law.buffalo.edu/bjil/vol3/iss2/1>, pp. 235–260.

297. ICRC, *Commentary of 2017*, para. 523.

298. ICRC, “Report on Humanitarian aid to the victims of internal conflicts. Meeting of a Commission of Experts in Geneva, 25–30 October 1962”, *International Review of the Red Cross*, Vol. 3, No. 23 (February 1963), pp. 79–91, https://www.loc.gov/rr/frd/Military_Law/pdf/RC_Feb-1963.pdf.

It is clear that the humanitarian crises caused by mines constitute “situations arising from the conflict”. It is therefore reasonable to conclude that humanitarian demining operations can still be regulated by IHL in post-conflict situations. Such operations must comply with the principles of humanity, neutrality, impartiality, and independence. However, neutrality will be easier to establish in the post-conflict context.

5.4 Independence

The principle of independence dictates that humanitarian action be “autonomous from the political, economic, military or other objectives that different stakeholders may hold in areas where humanitarian action is being implemented”.²⁹⁹ The ICRC defines its independence as “resistance to any pressure from outsiders – whether they are donors, international bodies, governments or armed groups – that would affect the ICRC’s ability to respond effectively to humanitarian needs, in accordance with its fundamental principles”.³⁰⁰ Independence is therefore not an end in and of itself, but is rather an operational principle that is, to varying degrees, necessary to ensure that humanitarian assistance is prioritised on the basis of humanitarian need and is not subjugated to the political or developmental goals of other actors.

With respect to humanitarian demining, it is essential to ensure that humanitarian demining organisation have the requisite decision-making independence to direct their activities to those communities with greatest need. If humanitarian demining is to be classified as a form of humanitarian assistance under IHL applicable in armed conflict, it cannot be dictated on the basis of political strategy or long-term development goals. For UNMAS, the greatest challenge to its independence is the UN’s policy of structural integration. There is no escaping the reality that UNMAS will work with and alongside UN peacekeeping forces and other UN actors under shared administrative direction. UNMAS must have sufficient operational independence to deliver its services to those communities most affected by abandoned anti-personnel mines without adverse distinction or politically-motivated selectivity. In

other words, it must be able to act in accordance with the principles of humanity and impartiality.³⁰¹

UN integration is a strategic policy to coordinate multi-mandated UN missions in conflict and post-conflict situations involving peacekeeping operations. The Secretary General has confirmed that integration “should take full account of humanitarian principles, protect humanitarian space and facilitate effective humanitarian coordination with all humanitarian actors”,³⁰² and, according to the UNOCHA, “humanitarian activities are largely understood to fall outside the scope of integration”.³⁰³ However, the independent study commissioned by the UN Integration Steering Group found that “[m]any NGOs are opposed to UN integration on principle, arguing that integration arrangements blur the distinction between humanitarian, military and political action, subordinate humanitarian priorities to political prerogatives and therefore place humanitarian action at significant risk.³⁰⁴ Indeed, integration has caused some NGOs, such as Médecins Sans Frontiers, to officially distance themselves from the UN.³⁰⁵ In Afghanistan, the Agency Coordinating Body for Afghan Relief and Development rejected a request to participate in a joint strategy with UNOCHA on the basis that it “is not an independent organisation since it is part of an integrated mission” and may therefore jeopardise negotiations to obtain humanitarian access.³⁰⁶ The problems that integration poses to humanitarian access and the fulfillment of the fundamental principles of humanitarian assistance are particularly pronounced. As stated by one commentator:

[In Afghanistan], The UN Humanitarian Coordinator also acts as Deputy Special Representative of the Secretary-General

299. UNOCHA, “What are humanitarian principles?” op. cit.; ECHO, Humanitarian Principles, op. cit.

300. ICRC, 2009 Glossary.

301. Sommaruga (1997), op. cit. (“[P]olitical efforts at conflict resolution and the requisite military support must be clearly separated from humanitarian action, which cannot be subordinated to the political aims of peace-keeping operations”).

302. UN Secretary General, Decision 2008/24 – Integration, Meeting of the Policy Committee (26 June 2008), <http://www.unicefinemergencies.com/downloads/eresource/docs/UN%20Integrated%20Presences/7526.pdf>.

303. UNOCHA Themes, “UN Integration”, <https://www.unocha.org/themes/un-integration>.

304. Metcalfe, Giffen and Elhawary (2011), op. cit., p. 1.

305. Donini (2011), op. cit., pp. 156-157.

306. Metcalfe, Giffen and Elhawary (2011), op. cit., p. 30.

*(DSRSG) in charge of assistance and as UN Resident Coordinator. This conflation underscores the consequences of integration from a humanitarian perspective: it is difficult, if not impossible, for the same person to be an advocate for humanitarian principles and impartial humanitarian action and at the same time act as the main interlocutor on reconstruction and development issues with the government and the Coalition forces.*³⁰⁷

The risk that integrations poses to humanitarian assistance is even more apparent where it concerns peacekeeping forces that have been authorised to use force. Such was the case in the Ivory Coast, where the senior humanitarian official reported to the same person that is in charge of UN peacekeeping forces with a mandate to use all means necessary.³⁰⁸ Meanwhile, NGOs in Somalia have similarly warned that they will be “forced to curtail strategic and operational engagement with UN humanitarian agencies on access if the UN proceeds with structural integration”.³⁰⁹

Contrary to the position of humanitarian personnel, the SRSGs, DSRSG/RC/HCs and DSRSGs (political) interviewed by the UN Integration Steering Group emphasised the advantages of integration, arguing that their combined role enables them to influence internal mission plans and external actors to prioritise humanitarian aid.³¹⁰ Either way, as stated by the Emergency Relief Coordinator, Valerie Amos, “Integration is a UN-mandated policy ... [w]ithdrawing from [it] is not an option.”³¹¹ Accordingly, for UN humanitarian aid organisations seeking to comply with the fundamental principles of humanitarian assistance, such as UNMAS, it is more important to focus on how they can retain sufficient operational independence in conflict environments under UN integration so as to maintain their exclusively humanitarian character. As stated by Cornelio Sommaruga, then-President of the International Committee of the Red Cross, “[w]

ithout ignoring the importance of achieving greater overall coherence in operations conducted at different levels in conflict situations, humanitarian agencies must maintain their total independence of decision and action, while consulting closely with peace-keeping forces at every phase and at every level, in a spirit of complementarity”.³¹²

To achieve the requisite independence of humanitarian actors, the OCHA’s structural relationships within an integrated UN presence policy devises three modalities of structural integration depending on the context: (1) complete physical separation of UNOCHA and the Humanitarian Coordinator from the structure of the UN peacekeeping or political mission (‘two feet out’); (2) complete structural integration (‘two feet in’); and (3) a default option with a separate UNOCHA presence but integration of the Humanitarian Coordinator within the UN mission (‘one foot in, one foot out’).³¹³ In the context of an ongoing armed conflict, particularly where UN presence is opposed or where the security situation is otherwise unstable, it will generally be necessary to adopt a “two feet out” approach so as to ensure maximum operational independence for humanitarian actors within the UN.³¹⁴ While doubt has been expressed as to the extent to which this policy would actually affect perceptions on the ground,³¹⁵ it at least recognises the importance of independence for humanitarian actors during complex emergencies. The UNOCHA Policy Instruction states that during “two feet out” operations, Humanitarian Coordinators within the UN system should be structurally independent from the SRSGs.³¹⁶ This decision is consistent with multiple recommendations that had been made to the UN Secretary General to protect

307. Donini (2011), op. cit., p. 152.

308. Anna JEFFERYS and Toby PORTER, “Ivory Coast is a case of too much UN coordination”, Alert Net (26 November 2004), <http://www.globalpolicy.org/ngos/aid/2004/1126ivorycoast.html>.

309. Metcalfe, Giffen and Elhawary (2011), op. cit., p. 30.

310. Ibid, p. 18.

311. UNOCHA News and Updates, “Humanitarian Issues: Integrating peacekeeping and humanitarian work – how to make it work?” (10 January 2012), <https://www.unocha.org/story/humanitarian-issues-integrating-peacekeeping-and-humanitarian-work-%E2%80%93-how-make-it-work>.

312. Ibid.

313. UNOCHA Policy Instruction, “OCHA’s structural relationships within an integrated UN presence”, (1 May 2009), <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/OCHA%E2%80%99s%20Structural%20Relationships%20Within%20An%20Integrated%20UN%20Presence.pdf>.

314. Ibid, pp. 12-13.

315. Metcalfe, Giffen and Elhawary (2011), op. cit., pp. 33-34.

316. UNOCHA Policy Instruction, p. 12, para. 6.2.2.

the independence of humanitarian action under integration during complex emergencies.³¹⁷

When applied to humanitarian demining operations conducted by UNMAS, the same principles of structural independence apply. It is essential that decision-makers within the organisation have sufficient operational independence so as to deliver their services on the basis of humanitarian need without being subjected to the political, strategic, or military considerations of other UN actors. This degree of independence is a prerequisite for humanitarian assistance providers to fulfil their obligations of humanity and impartiality.

5.5 Summary

This section has considered whether humanitarian demining can be classified as a form of humanitarian assistance under IHL. Firstly, it is apparent that humanitarian demining is a “humanitarian activity” on the basis that it is an essential means of protecting the civilian population from the indiscriminate effects of mines and is essential to their survival by clearing a path for the delivery of essential aid, such as food and medical supplies. Secondly, it has been shown that, subject to several important restraints in the means and mode of operation, humanitarian demining can be conducted in a manner compliant with the fundamental principles of humanitarian aid: humanity, impartiality, neutrality, and independence.

Humanitarian demining complies with the principles of humanity and impartiality where it is conducted on the basis of humanitarian need without adverse distinction. It complies with the principle of neutrality where it is limited

to clearing abandoned anti-personnel mines in civilian-populated areas, away from the conduct of hostilities, so as to ensure that it does not inadvertently provide a definite military advantage to a party to the conflict. It further complies with the principle of political neutrality where it takes measures to ensure that any political affiliation does not interfere with the commitment to the principles of humanity and impartiality. Finally, humanitarian demining complies with the principle of independence where it can exercise sufficient decision-making autonomy so as to deliver its services on the basis of humanitarian need without being subjugated by the political or development goals of other actors.

317. United Nations (2000) Guidance on the relations between Representatives of the Secretary General, Resident Coordinators and Humanitarian Coordinators. New York, United Nations, https://unsdg.un.org/sites/default/files/1057-Guidance_Notes_on_Relations_between_SRSG_RCs_and_HCs_-_Guidance_Notes_on_Relatio1.pdf; Inter Agency Standing Committee, United Nations (1996) Respect for humanitarian mandates in conflict situations, United Nations, New York https://interagencystandingcommittee.org/system/files/legacy_files/respect_for_h_mandates.doc.pdf; Joanna MACRAE and Nicholas LEADER, “Shifting Sands: The Search for ‘Coherence’ Between Political and Humanitarian Responses to Complex Emergencies”, Humanitarian Policy Group Report, No. 8, HPG-ODI, London (2000), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/299.pdf>, p. 6.

6. CAN HUMANITARIAN DEMINING EQUIPMENT BE REMOVED FROM A HUMANITARIAN CONVOY?

So far, it has been proposed that: (1) the State or territorial authority has the primary responsibility to meet the needs of the civilian population under their effective control, which includes humanitarian demining in certain contexts; (2) where the State or territorial authority is unable to engage in humanitarian demining and the civilian population is inadequately provided for, impartial humanitarian organisations are entitled to offer humanitarian assistance; (3) providing it complies with the fundamental principles of humanity, impartiality, neutrality, and independence, humanitarian demining can be classified as a form of humanitarian assistance and may therefore be offered to a party to the armed conflict in situations where the civilian population under its control is inadequately provided for.

This Section considers whether the affected State is entitled to refuse the offer of humanitarian demining assistance or simply remove the necessary demining equipment from the humanitarian convoy. In short, the provision of humanitarian assistance is subject to the consent of the affected State, meaning that the State may refuse offers of assistance. Even where consent to humanitarian assistance is granted, the affected State retains the right to supervise and control the humanitarian mission, and may therefore remove demining equipment on the basis that it deems it to be unfit for a humanitarian purpose or because it poses a risk of providing a definite military advantage to the enemy. Accordingly, an affected party to the armed conflict may refuse humanitarian demining assistance or remove the necessary equipment.

However, there are several qualifications and exceptions to this rule which may, under certain circumstances, pressure the State into providing its consent to avoid violating international law, or authorise the delivery of humanitarian assistance without the consent of the State. To this end, the following rules and principles of international law are considered in this Section:

1. The general rule is that the provision of humanitarian assistance is subject to the consent of the affected State;
2. There are two exceptions to this general rule. Firstly, under the law of Occupation, the Occupying Power is legally obligated to provide its consent to offers of humanitarian assistance to impartial humanitarian organisations where the civilian population under its control is inadequately provided for. Secondly, the UN Security Council can issue a binding resolution overriding the requirement of consent altogether.
3. In all other situations, consent is required. However, the affected State is under an obligation not to arbitrarily withhold its consent to humanitarian assistance. Applied to humanitarian demining, a State's decision to withhold its consent will not be arbitrary where it is able and willingness to respond to the threat of mines itself, where it has received sufficient assistance elsewhere, or where the offer of assistance is not in compliance with the fundamental principles. Outside of these scenarios, the withholding of consent may be deemed arbitrary and must be determined on a case-by-case basis.
4. To obtain the consent of the affected State or territorial authority, humanitarian demining organisations should make assurances that: (a) they will destroy deactivated mines so they cannot be reused; (b) they will not seek to apportion blame for mines that may have been laid in violation of international law; and (c) they will operate in accordance with the fundamental principles of humanitarian assistance.
5. Finally, where consent is provided, the affected State is under an obligation to allow and facilitate unimpeded access to humanitarian demining operations, while retaining the

rights of control and supervision. When these rights are effectively communicated, most humanitarian demining equipment should pass inspection.

6.1 The requirement of consent

As a general rule, it can be said that offers of humanitarian relief operations must be consented to before they can be carried out. The present section will provide the legal bases for the requirement of consent, and specify which actor's consent should be sought and in which case. The following subsection (6.2) will examine the exceptions to the requirement of consent.

Obtaining consent of the State on which humanitarian assistance is to be delivered is a natural consequence of the principle of sovereignty.³¹⁸ The necessity of such consent can also be derived from the fact that States are the main duty-bearers with respect to ensuring the enjoyment of international human rights by persons under their jurisdiction.³¹⁹

Under IHL applicable in IAC, the consent of the "parties concerned" is required before relief action may be undertaken. According to the ICRC, "[t]hree types of Party may be concerned: those from whose territory an action is undertaken or from which relief has been sent, those through whose territory relief consignments pass, and those receiving relief".³²⁰ The consent of party to which the humanitarian operation will be delivered is always required. The consent of other States Party to the conflict is only required if the convoy must pass on the territory under the effective control of these States.³²¹

As for the consent of non-belligerent States in whose territory the operations are initiated or transit, it is not clear to what extent it must also be sought. Article 23(2) of GC IV, which lists cases where consent by each High Contracting Party (i.e. not merely belligerent parties) may be withheld, was reformed by article 70 of API and should be considered obsolete.³²² The latter

provision does not directly refer to the consent of non-belligerent Parties. There is a debate about whether such States are under a total obligation to consent to humanitarian relief operation or if they have latitude to withhold consent as long as they do so in a non-arbitrary manner.³²³ In any case, all non-belligerent States have a duty to promote compliance with IHL by parties to an armed conflict,³²⁴ including in relation to the delivery of humanitarian assistance.³²⁵

Under the law of Occupation, the Occupying Power has no latitude to withhold consent. Rather, it "shall agree to relief schemes" destined to civilians finding themselves in the occupied territory. Non-belligerent States in whose territory the operations are initiated or transit, must permit free passage of relief consignments destined for the civilian population in an occupied territory, and like the occupying power, may not withhold consent to such passage.³²⁶

Under IHL applicable in NIAC, *Common Article 3(2)* contains the right of an impartial humanitarian body to offer its services, which indicates that Parties to the conflict have the possibility to withhold consent.³²⁷ Article 18(2) of AP II also says that actions may be undertaken subject to the consent of the High Contracting Party concerned, which is commonly understood as referring to the affected State.³²⁸

323. Oxford Guidance, paras. 99-105 and 108-119.

324. Oxford Guidance, para. 129; Common Article 1; Art. 1 of AP I.

325. Art. 70(5) of AP I.

326. Art. 59(3) of GC IV; Oxford Guidance, para. 98.

327. ICRC, Commentary of 2016, paras. 827-831.

328. Several scholars have argued that the affected State is only "concerned" where the relief must pass through the territory under their control, and that where it can be delivered to the territory controlled by the armed group directly, the consent of the affected State is not required. See: Michael BOTHE, "Relief Actions: The position of the Recipient State", in Frits Kalshoven (ed.), *Assisting the Victims of Armed Conflicts and Other Disasters- Papers Delivered at the International Conference on Humanitarian Assistance in Armed Conflict, The Hague (1988)*, p.94; Nishat NISHAT, "The Right of Initiative of the ICRC and Other Impartial Bodies", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press (2015), p. 502, para. 25; Cedric RYNGAER, "Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective", *Amsterdam Law Forum*, Vol. 5, No. 2 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293349, p. 17; Emilie KUIJIT, "Legal Challenges in the Provision of Humanitarian Assistance: The Case of Non-International Armed Conflicts", in Terry Gill (ed), *Yearbook of International Humanitarian Law*, Asser Press, Vol. 17 (2014), p. 145.

318. Art. 2(1) of the UN Charter.

319. Arts. 2(1) of the ICCPR and 2(1) of the ICESCR and section 3.2 above.

320. Art 70(1) of AP I; ICRC, Commentary of 1987, para. 2806.

321. Oxford Guidance, para. 23.

322. ICRC, Commentary of 1987, para. 2851.

The following question arises: if the population in need can be reached without passing through areas under the control of the territorial State, but only by passing through areas under control by non-State territorial authority, can the consent of the latter suffice? Support for this solution can be found in the premise that IHL grants obligations also to non-State actors and that territorial control should be the decisive criterion from a humanitarian perspective.³²⁹ However, the mainstream perspective, as supported by the ICRC, is that the consent of the affected State is always required as a condition of sovereignty.³³⁰ A possible compromise has been put forward by Emanuela-Chiara Gillard, suggesting that the sovereign State's consent is always required, but that the circumstance that the State is not in control of the territory where the humanitarian assistance is to be delivered reduces the State's latitude to withhold consent to the operation, without such denial being considered arbitrary.³³¹

Common article 3(2) and *article 18(2)* of APII do not address the position of non-belligerent States. This gives the latter the freedom to regulate, under domestic law, the initiation from - or transit through - their territory of humanitarian relief operations. This regulation should not be in violation of other international legal obligations.³³²

6.2 Exceptions to the requirement of consent

There are two instances in which the consent of the concerned State is not required: (1) an Occupying Power may not refuse access of humanitarian assistance destined for the civilian population

under its control; and (2) a UNSC Resolution may override the requirement of consent.

Within a State, the authority responsible for providing consent is a matter of domestic law and is not regulated under international law. It will most frequently be through a decision of an organ of the Executive branch of Government. The form in which such consent must be given is not regulated either, but it cannot automatically and in all circumstances be concluded that silence or acquiescence by the Government amounts to consent.³³³

6.2.1 Occupation

Pursuant to article 59 of GC IV, an Occupying Power "shall agree to relief schemes" if the population of the occupied territory is inadequately supplied. This is without prejudice to the right to prescribe technical arrangements, which we will discuss under section 6.5 below.

6.2.2 UNSC binding resolutions

The UN Security Council, acting under Chapter VII of the UN Charter, has the power to impose obligations to grant humanitarian access to humanitarian relief operations, regardless of the consent of the affected State(s). This power was exercised for the first time in Resolution 2139 (2014) in which the Council demanded the parties to the conflict in Syria allow humanitarian relief operations, removing the requirement of consent.³³⁴ Previous UNSC Resolution on humanitarian assistance required parties to the conflict to create the necessary security conditions to facilitate humanitarian action. Resolution 2139 (2014) on Syria was the first to use obligatory language on cross-border humanitarian access.³³⁵

6.2.2.1 UNSC Resolutions creating the security conditions to allow for the safe passage of humanitarian relief or urging parties to the conflict to grant their consent

In 1991, in response to the Iraqi government's repression of the civilian population in the Kurdish-populated areas in the North of the country, the

329. Françoise BOUCHET-SAULNIER, "Consent to humanitarian access: An obligation triggered by territorial control, not States' rights", *International Review of the Red Cross*, Vol. 96, No. 893 (2014), pp. 207–217, <https://international-review.icrc.org/sites/default/files/irrc-893-bouchet-saulnier.pdf>; Michael BOTHE, Karl Josef PARTSCH and Waldemar A. SOLF, "Part IV: Civilian Population", *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Brill/Nijhoff, 2nd edition, Vol. 1 (2013), pp. 767–802.

330. ICRC, "ICRC Q&A and Lexicon on Humanitarian Assistance" (June 2014) <https://www.icrc.org/en/doc/assets/files/2014/icrc-q-and-a-lexicon-on-humanitarian-access-06-2014.pdf>, p. 10. See also: Oxford Guidance, paras. 25–31.

331. Gillard (2013), op. cit., pp. 366–367; On arbitrary withholding of consent, see section 6.3 below.

332. Oxford Guidance, paras. 106–107.

333. Oxford Guidance, paras. 37–41.

334. Oxford Guidance, para. 36.

335. UNSC Resolution 2139 S/RES/2139 (22 February 2014), para. 6.

UN Security Council adopted Resolution 668, in which it insisted that Iraq allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and appealed to all member states and all humanitarian organisations to contribute to humanitarian relief efforts. Despite the fact that this was initially done without Iraq's consent, the precedential value of this Resolution is limited in terms of overriding consent of the territorial authority. Firstly, it was not adopted under Chapter VII of the UN Charter. Secondly, the United States-led multinational force that was subsequently created took effective control over the concerned territory. Thirdly, the UN and Iraq finally signed a Memorandum of Understanding governing the UN's activities in the North.³³⁶

In a series of successive resolutions in 1992, the Security Council demanded that conditions be created which would allow for the delivery of humanitarian aid in Bosnia and Herzegovina, calling on all States to take all necessary measures to facilitate such delivery, and acting under Chapter VII. In this case however, the territorial authority (Bosnia and Herzegovina) consented to the delivery of humanitarian assistance, which was impeded by another belligerent party.³³⁷

In 1992, the Security Council authorised member states to establish an operation "to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia". In this context, the Resolution, adopted under Chapter VII, authorised the use of force to allow humanitarian access. This was done by the establishment of a United States-led multi-national force. However, one cannot yet speak of forcing a State to consent to humanitarian access, as at the time Somalia was considered as not having an effective government.³³⁸

In 2019, examples such as the Central African Republic,³³⁹ Sudan and South Sudan,³⁴⁰ the Democratic Republic of the Congo,³⁴¹ and Mali,³⁴² the UN Security Council demanded that all parties allow and facilitate the delivery of humanitarian assistance. The UNSC thereby demands parties to the conflict to give their consent to humanitarian relief operations.

6.2.2.2 UNSC Resolutions on humanitarian access to Syria

On 2 October 2013, a Presidential Statement was issued by the UNSC which addressed in detail the delivery of humanitarian assistance on Syrian territory.³⁴³ This was followed by Resolution 2139, which without invoking Chapter VII demanded that all parties allow for the delivery of humanitarian assistance, including across conflict lines and across borders.³⁴⁴ Deeply concerned by the continued withholding of consent, which it qualified as arbitrary, the UNSC went further in an unprecedented manner in Resolution 2165 by deciding to authorize humanitarian organisations to use routes across conflict lines and listed four border crossing points, in addition to existing routes, which could be used to deliver humanitarian aid with mere notification of the Syrian authorities. In parallel, the UNSC established a monitoring mechanism to confirm the humanitarian nature of relief consignments and to supervise the control they received from Syrian customs authorities.³⁴⁵ For the listed crossing points, the Syrian Government's consent is therefore overridden.

This unprecedented system, obliging Syrian authorities to allow humanitarian access, was successively renewed.³⁴⁶ In line with those

336. UNSC Resolution 688, S/RES/688 (5 April 1991), paras. 3 and 6; Gillard (2013), op. cit., p. 380.

337. UNSC Resolution 752, S/RES/752 (15 May 1992), para. 8; UNSC Resolution 757, S/RES/757 (30 May 1992), para. 17; UNSC Resolution 770, S/RES/770 (13 August 1992), para. 2; UNSC Resolution 781, S/RES/781 (9 October 1992), para. 1; Gillard (2013), op. cit., p. 379.

338. UNSC Resolution 794, S/RES/794 (3 December 1992), para. 10; Gillard (2013), op. cit., p. 37-380.

339. UNSC Resolution 2499, S/RES/2499 (15 November 2019), para. 49.

340. UNSC Resolution 2497, S/RES/2497 (14 November 2019), para. 23.

341. UNSC Resolution 2463, S/RES/2463 (29 March 2019), para. 36.

342. UNSC Resolution 2480, S/RES/2480 (28 June 2019), para. 54.

343. UNSC, Statement by the President of the Security Council, S/PRST/2013/15 (2 October 2013), <https://undocs.org/pdf?symbol=en/S/PRST/2013/15>; Gillard (2013), op. cit., p. 380-381.

344. UNSC Resolution 2139 (2014), paras. 4-6.

345. UNSC Resolution 2165 (2014), Preamble, p. 2., paras. 2-3.

346. UNSC Resolution 2191 (2015) para. 2; UNSC Resolution 2258 (2015), para. 2; UNSC Resolution 2332 (2016), para. 2; UNSC Resolution 2393 (2017), para. 2; UNSC Resolution 2449 (2018), para. 3.

resolutions, the United Nations notified the Syrian authorities in advance of each shipment, including its contents, its destination and the number of beneficiaries expected to be reached.

It is worth recalling that Resolution 2449, which renews the mechanism overriding consent of the territorial authority, expressly calls for “humanitarian mine action to be accelerated as a matter of urgency throughout Syria”,³⁴⁷ thereby linking humanitarian assistance with humanitarian demining.

The effects of the Resolution 2449 were to expire on 10 January 2020. After a heated exchange at the Security Council,³⁴⁸ the system was only partially renewed. Only two of the four previous border crossings were listed, for a period of six months (instead of one year). The re-authorization for the use of crossing points in al-Ramtha (Jordan) and Al Yarubiyah (Iraq) was denied.

Practically, the partial renewal means that for all the borders not included in Resolution 2449 providing humanitarian assistance must be conducted with the consent of the recipient and host governments. But for the two-remaining crossing-points (Bab al-Salam and Bab al-Hawa in Turkey), the State of Syria will still only be notified, and no consent will be sought for the next six months. If in the future the system is not renewed, the situation will “shift back” to being governed by the requirement of consent, which, as discussed below, may not be arbitrarily withheld.

6.3 The obligation not to arbitrarily withhold consent

In the case of Occupation, consent must be provided. There is no latitude for the Occupying Power to consider offers of humanitarian assistance from impartial humanitarian organisations where the civilian population is inadequately provided for; it is legally obliged to give its consent. In the case of UNSC authorisation, consent is *not legally required*. A binding UNSC Resolution demanding cross-border relief overrides the requirement of consent altogether.

347. UNSC Resolution 2449 (2018), Preamble, p. 4.

348. UN News, “Security Council beats midnight deadline, renews Syria cross-border aid in contentious vote” (10 January 2020), <https://news.un.org/en/story/2020/01/1055181>.

In all other cases, the consent of the affected state is *legally required*. However, the affected State is under an obligation not to arbitrarily withhold its consent.

Two pre-conditions must be met before exploring the arbitrariness of the withholding of consent: (1) the civilian population must be inadequately supplied; and (2) offers of services must have been made by actors capable of carrying out relief operations that are exclusively humanitarian, impartial, and conducted without adverse distinction.

6.3.1 Origin and scope of the obligation not to arbitrarily withhold consent

Provided that these conditions are met, the possibility to withhold consent is not left entirely to the discretion of the State: consent to a humanitarian relief operation cannot be refused on arbitrary grounds.³⁴⁹ This is shown by the drafting history of article 70 of AP I and article 18 of AP II. Despite the concern to protect national sovereignty, it was stated that the right to withhold consent “did not imply that the Parties concerned had absolute and unlimited freedom to reduce their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones”.³⁵⁰ Outside IHL treaty provisions, the principle that consent to external humanitarian assistance cannot be arbitrarily withheld is found in several international law instruments.³⁵¹

Consent is considered to be arbitrarily withheld in three cases. Firstly, withholding consent is arbitrary where it results in the violation of another international legal obligation.³⁵² For example,

349. Principle 25 of the Guiding Principles on Internal Displacement (1998); Oxford Guidance, paras. 43 ff.

350. ICRC, Commentary of 1987, para. 2805; Oxford Guidance, para. 46.

351. Principle 25(2) of the Guiding Principles on Internal Displacement; Institute of International Law, Resolution on Humanitarian Assistance, Bruges Session (2 September 2003) <https://www.ifrc.org/Docs/idrl/I318EN.pdf> (“VIII : Duty of affected states not arbitrarily to reject bona fide offer of humanitarian assistance); International Law Commission, Draft Articles on the Protection of Persons in the Event of Disasters (2016), https://legal.un.org/ilc/texts/instruments/english/draft_articles/6_3_2016.pdf (Art. 13(2): “Consent to external assistance shall not be withheld arbitrarily”).

352. Oxford Guidance, paras 50-51.

under IHL, the starvation of civilians as a method of warfare is prohibited.³⁵³ Withholding consent to humanitarian assistance to cause or contribute to starvation therefore violates this prohibition and would be arbitrary. A discriminatory approach to the granting of consent to humanitarian access could amount to a violation of the prohibition of adverse distinction in applying IHL,³⁵⁴ or of the obligation to facilitate the collection of wounded and sick, including of the adverse party.³⁵⁵ Under IHRL, the right to life or to essential health are obligations of the State which could also be violated if that State denies access to humanitarian relief.³⁵⁶ Secondly, withholding of consent would be arbitrary if it violates the principles of proportionality and necessity.³⁵⁷ This means that even if consent is withheld for an apparently valid reason (e.g. military necessity and the need not to impede a military operation): “it will nonetheless be arbitrary if it exceeds what is necessary in the circumstances, and thus is disproportionate. Limitations in terms of time, duration, location, and affected goods and services must not go beyond what is necessary to achieve the legitimate aim”.³⁵⁸ Lastly, arbitrary denial of consent may occur if the withholding is unreasonable, unjust, unpredictable or inappropriate.³⁵⁹ Examples include the failure to give reasons for withholding of consent,³⁶⁰ or refusal which is based on adverse distinction or otherwise unreasonable in the circumstances.³⁶¹

353. Arts. 54 of AP I in IAC and 14 of AP II in NIAC; ICRC, Commentary of 1987, para. 2808; ICRC, Commentary of 2016, para. 834. In addition to being a violation of IHL, withholding of consent to humanitarian assistance that amounts to intentionally using starvation of civilians as a method of warfare is a war crime in IAC under Art. 8(2)(b)(xxv) of the Rome Statute and in NIAC under Art. 8(2)(e)(xix) of the Rome Statute.

354. Common Article 3; Art. 16 of GC III; Art. 13 o GC IV; Arts. 9(1), 69(1), 70(1) and 75(1) of AP I; Arts. 2(1) and 4(1), of AP II; Rule 88 of the ICRC Study on Customary IHL.

355. Common Article 3; Art. 15(1) of GC I; Art. 18(1) of GC II; Art. 16(2) of GC IV; Art. 10 of AP I; Art. 8 of AP II; Rule 109 of the ICRC Study on Customary IHL and its commentary: “This includes permitting humanitarian organizations to assist in their search and collection. Practice shows that the ICRC in particular has engaged in the evacuation of the wounded and sick. It is clear that in practice humanitarian organizations will need permission from the party in control of a certain area to carry out such activities, but such permission must not be denied arbitrarily (...)”.

356. Oxford Guidance, para. 51.

357. Oxford Guidance, para. 52.

358. Oxford Guidance, para. 52; See also Gillard (2013), op. cit., p. 362.

359. Oxford Guidance, paras. 53-54.

360. Ibid.

361. ICRC, Commentary of 2016, paras. 837.

Consent is considered not to have been arbitrarily withheld in the following circumstances: (1) the affected State is itself willing and able to respond; (2) it has received sufficient assistance elsewhere; or (3) the offer is not extended in accordance with the principles of humanity, impartiality, or neutrality.³⁶²

6.3.2 Applying the obligation not to arbitrarily withhold consent to humanitarian demining

Determining whether the withholding of consent to humanitarian demining operations or equipment is arbitrary must be done on a case-by-case basis. The nexus between demining and military objectives means that there are foreseeable circumstances in which it would not be arbitrary to refuse humanitarian demining assistance, due to the possibility certain demining equipment could be misused by the opposing armed force to create a military advantage or otherwise interfere with the military objectives of the concerned State. However, military necessity will not be considered valid grounds to refuse offers of humanitarian assistance in their entirety,³⁶³ as arrangement can be made to limit and direct the assistance as appropriate. Moreover, as discussed below, the ICRC maintains that refusing offers of humanitarian assistance where the civilian population is inadequately provided for is arbitrary.³⁶⁴

6.3.2.1 *Prima facie* examples of arbitrary refusals

The ICRC’s updated Commentary to Common Article 3 states that:

[R]efusal may be considered arbitrary if it entails a violation of the Party’s obligations under humanitarian law or other fields of international law, such as applicable human

362. International Law Commission, Eduardo VALENCIA-OSPINA, Special Rapporteur, Fourth Report on the Protection of Persons in the Event of Disasters, A/CN.4/643 (11 May 2011), <https://undocs.org/en/A/CN.4/643>, paras. 51-77 (Commentary to Draft Article 11, which subsequently became Draft Article 13 “Consent of the affected State to external assistance” of the Draft Articles on the Protection of Persons in the Event of Disasters). See also: Matias THOMSEN, “The Obligation not to Arbitrarily Refuse International Disaster Relief: A Question of Sovereignty”, The Melbourne Journal of International Law, Vol. 16, No. 2 (2015), https://law.unimelb.edu.au/_data/assets/pdf_file/0008/1687787/Thomsen.pdf, p. 22.

363. ICRC, Commentary of 2017, para. 865.

364. Ibid, paras. 862-863.

*rights law. This will be the case, for example, when the Party concerned is unable or unwilling to provide humanitarian assistance to the persons affected by the armed conflict, and even more so if their basic needs enabling them to live in dignity are not met.*³⁶⁵

The Commentary goes on to state that “[n]o valid reasons to refuse such an offer exist ... when the Party to which the offer of services is made is not able to address the humanitarian needs itself”.³⁶⁶ Accordingly, if the civilian population is subjected to the indiscriminate effect of anti-personnel mines and, as a result, is unable to receive essential humanitarian aid, refusing humanitarian demining assistance would be considered arbitrary. However, where the offer is not extended in accordance with the fundamental principles of humanitarian assistance, as discussed in Section 5, the affected State or territorial authority is entitled to refuse. Accordingly, the rule espoused by the ICRC applies to all valid (humanitarian, impartial, and neutral) offers of humanitarian assistance under the rules of IHL.

Refusing humanitarian demining assistance could also independently violate other international legal obligations. In situations where humanitarian demining assistance is rejected in order to marginalise a particular group in society it would violate the prohibition on adverse distinction. In extreme circumstances, this could amount to a deliberate attempt to subject the affected population to cruel or inhuman treatment, starvation, or other inhumane acts as part of a widespread attack, each of which would violate international law and therefore be considered arbitrary.

Withholding consent will be arbitrary where it is “unreasonable, unjust, unpredictable or inappropriate”,³⁶⁷ which must be determined on a case-by-case basis. For example, where assistance is refused solely to maintain public perceptions of competency despite objective humanitarian need, or to avoid legitimising a non-State armed group in situations where humanitarian demining is necessary in the territory under that group’s

control, it would be deemed arbitrary under international law.³⁶⁸

Even where the basis of the decision to withhold consent is justified, for example to keep external actors away from the conduct of hostilities or to prevent demining equipment from being misused by the enemy, it may not be necessary or proportionate to refuse all humanitarian demining assistance in its entirety. For example, the affected State could limit operations to areas away from the conduct of hostilities and subject them to strict supervision and control so as to ensure that the equipment is not misappropriated.

6.3.2.2 Where the affected State is itself able and willing to respond

If the affected State is able and willing to respond to the threat of abandoned anti-personnel mines on its territory by limiting their indiscriminate effect and clearing a path for the delivery of essential humanitarian aid, refusing offers of humanitarian demining assistance will not be deemed arbitrary. An affected State’s assessment of its own capacity to respond to the threat of abandoned anti-personnel mines should be “prima facie accepted so that the burden of proof lies with the assisting actor to prove otherwise”.³⁶⁹ However, the following objective criteria will be necessary to determine whether the affected State has ability and willingness to engage in humanitarian demining as a matter of fact.

Firstly, if the affected State publicly admits that it is unable or unwilling to sufficiently respond to the impact of abandoned anti-personnel mines, there is a distinct possibility that refusing humanitarian demining assistance will be considered arbitrary. If the offer is provided in accordance with the fundamental principles of humanitarian assistance and the affected State has either failed to provide reasons for its refusal or cites “mere arbitrary or capricious” reasons, such as those noted above relating to perceptions of political competence or national pride, it is likely that the refusal is arbitrary and in violation of international law.

365. Ibid, para. 862.

366. Ibid, para. 863.

367. Oxford Guidance, paras. 53-54.

368. Dapo AKANDE and Emanuela-Chiara GILLARD, “Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict”, *International Law Studies*, US Naval War College, Vol. 92 (2016), pp. 483-511, <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1696&context=ils>, p. 500.

369. Thomsen (2015), p. 23.

Secondly, if there is evidence of extensive human suffering due to the indiscriminate effect of anti-personnel mines and/or the inability of humanitarian organisations to gain access to provide relief due to the presence of such mines, it will indicate that the affected State is unable or unwilling to respond with the necessary demining services. The obvious flaw with this test is that large-scale suffering must occur before it becomes apparent that the affected State is unable or unwilling to respond.³⁷⁰ However, it provides a necessary evidence-based evaluation of whether the State is meeting the needs of the civilian population. Where it is demonstrated that the affected State is unable or unwilling due to extensive suffering caused by the presence of mines, it is likely that refusing impartial offers of humanitarian assistance will be deemed arbitrary.

Thirdly, where there is *manifest* evidence that the affected State is unable or unwilling to engage or facilitate necessary humanitarian demining services, it enlivens the possibility that refusing assistance will be arbitrary.³⁷¹ This criterion requires a factual-based assessment of the affected State's response to the threat of abandoned mines on its territory. If it has a clear record of ignoring the plight of its people affected by the presence of mines or it is known to have inadequate resources, there may be sufficient evidence to demonstrate that it is either unwilling or unable to respond to the present crisis. In some situations, this may enable classifying a refusal of consent as arbitrary without waiting for the suffering of civilians to reach the "extensive" threshold noted above.³⁷²

6.3.2.3 Where the affected State has received sufficient assistance elsewhere

The affected State is usually in the best position to determine the extent and nature of the threat posed by abandoned mines within its territory and

therefore the type of demining assistance that may be required. The ability to choose between offers of humanitarian demining assistance is a logical component of its sovereign right to accept and control the provision of external assistance. Providing that the accepted offer is sufficient to meet the needs of mine-affected communities, it will not be arbitrary to reject subsequent offers of assistance. The threshold for what constitutes "sufficient" humanitarian demining assistance should be at the discretion of the affected State until contrary evidence of human suffering becomes apparent. Importantly, this rule promotes the right of the affected State to preference regional humanitarian demining assistance, which may be more political appealing.³⁷³

6.3.2.4 Where the offer is not provided in accordance with the fundamental principles of humanitarian assistance

As discussed in Section 5, where the offer of humanitarian demining assistance is not provided in accordance with the fundamental principles of humanity, impartiality, and neutrality, the affected State will have a legitimate, non-arbitrary reasons for withholding consent. Violation of the fundamental principles is a question of fact and degree. Compliance with humanity, impartiality, and neutrality as non-engagement in the hostilities must be adhered to at all times and non-compliance would provide a legitimate, non-arbitrary reason for the affected State to withhold its consent.

The next subsection considers practical steps that humanitarian demining organisations can take to increase the likelihood of obtaining the necessary consent.

6.4 Practical considerations in obtaining consent for humanitarian demining assistance

Outside situations of Occupation or UN Security Council authorisation, offers of humanitarian assistance are subject to the requirement of consent. While the State is under an obligation not to arbitrarily withhold its consent, the consequences of violating this obligation do not necessarily permit

370. J. Benton HEATH, "Disasters, Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission", *New York University Journal of International Law and Politics*, Vol. 43, No. 2 (2011), <https://nyujilp.org/wp-content/uploads/2013/02/43.2-Heath.pdf>, pp. 459-460.

371. *Ibid.*, p. 464.

372. In the context of international disaster relief, the example of Haiti is given on the basis that it was well-known that the country possessed insufficient capabilities to respond to the disaster and thus it could not have justified refusing international assistance on this ground. See *ibid.*, p. 473 and Thomsen (2015), *op. cit.*, p. 24.

373. This section is substantially based on a similar analysis provided in the context of the obligation not to arbitrarily refuse offers of disaster assistance, in Thomsen (2015), *op. cit.*, p. 25.

humanitarian assistance to be delivered without the State actually providing its consent (as discussed in Section 7). Accordingly, it is preferable for impartial humanitarian organisations to negotiate with the affected party to the conflict to obtain the necessary consent to deliver humanitarian demining assistance. This subsection outlines three assurances that humanitarian demining organisations can provide the affected State or territorial authority in order to obtain consent:

1. that deactivated mines will be destroyed so that they cannot be reused by the opposing armed force;
2. that the organisation will not seek to apportion any blame for uncovering or removing mines that may have been laid by that party in violation of international law; and
3. that humanitarian demining assistance is offered to both sides of a conflict and is not used as a means of providing political legitimacy to a non-State armed group in situations where it is necessary to remove mines in the territory under that group's control.

The factors identified above apply in addition to the fact that humanitarian demining organisations should communicate to the affected State or territorial authority the fact that they: (a) are impartial and humanitarian in character; and (b) conduct their operations in accordance with the fundamental principles of humanity, impartiality, neutrality, and independence. In particular, as outlined in [Section 5](#), this requires the organisation to limit demining activities to abandoned anti-personnel mines in civilian-populated areas, away from the conduct of hostilities, and to retain sufficient political neutrality and operational independence to prioritise cases on the basis of humanitarian need without adverse distinction or undue political influence.

6.4.1 Assurances of stockpile destruction

Relief organisations may seek to provide assurances to the affected State or territorial authority that: (a) cleared mines will be destroyed so as to remove the possibility that they could be reused by an opposing armed force or terrorist group; and (b) that the humanitarian demining

organisation is not seeking to apportion blame or publicly denounce the State or territorial authority for failing to comply with any treaty obligations to which it may be party or for otherwise laying mines in a manner contrary to IHL.

With regard to stockpile destruction, it is included in the five pillars of humanitarian mine action precisely because undestroyed stockpiles of mines have been reused by warring factions in the past, notably in Vietnam and Afghanistan, thereby threatening the civilian population and defeating the objectives of humanitarian demining. Stockpile destruction is therefore already being promoted as a matter of course. However, communicating this capability to the State or territorial authority may be especially important in order to provide assurances that any cleared mines will not subsequently be used against them.

6.4.2 Assurances of non-apportionment of blame for potential violations of international law

Assurances as to the non-apportionment of blame for potential violations of treaty and/or IHL obligations may present a tricky situation for humanitarian demining organisations whose mandate involves pressuring States to ratify the Anti-personnel Mine Ban Treaty or non-State armed groups to sign a Deed of Commitment not to use anti-personnel mines. On the one hand, one of the most effective methods to achieve this objective is to name and shame offending States or armed groups in the hope of attracting public criticism and using the international legitimacy pull to attract behavioural change. On the other hand, if the organisation's other objectives include facilitating humanitarian demining operations, the most effective way of ensuring that objective is to gain the trust and confidence of the affected State or territorial authority.

6.4.3 Engaging with all affected parties to the armed conflict

Finally, it is also worth considering some of the practical and political implications of engaging with non-State armed groups in order to obtain the necessary consent to deliver humanitarian demining assistance in the context of NIAC.

GICHD's 2006 Report on *Armed Non-State Actors and Landmines*,³⁷⁴ in addition to compiling evidence of non-State armed group involvement in the five pillars of mine action,³⁷⁵ notes that non-State armed groups "can be distrustful or suspicious of demining operations, especially where it concerns mines laid by the group themselves".³⁷⁶ This finding emphasises two of the issues previously raised. Firstly, that it may be necessary to provide assurances of non-apportionment of blame in order to gain the trust of the non-State armed group; and secondly, that it may be necessary to destroy mines that are removed in order to assure the armed group that they will not be used against them.³⁷⁷

On the other end of the spectrum, the report highlighted that a lack of trust on behalf the concerned State often led that State to obstruct the practical aspects of humanitarian demining cooperation with the non-State armed group, such as blocking visas, travel permits, and other technical or bureaucratic interferences that would delay the delivery of equipment. In some cases, the government of the concerned State halted mine action activities entirely.³⁷⁸ The report notes that some organisation were able to overcome the lack of trust on behalf of States by working with both parties to the conflict in equal measure, or by convincing the State of the humanitarian benefit of mine action.³⁷⁹

Another practical means of convincing the affected State or territorial authority to consent to humanitarian demining assistance is to remind them of their obligation to limit the indiscriminate effects of mines under customary IHL or, where applicable, to removal all anti-personnel mines under the *Anti-Personnel Mine Ban Treaty*. With regard to States, where the presence of abandoned anti-personnel mines is indiscriminately affecting the civilian population and preventing essential humanitarian

access, consenting to offers of humanitarian demining assistance may be a necessary means of fulfilling the obligation to limit the indiscriminate effects of mines under customary IHL. Specific to States party to the *Anti-personnel Mine Ban Treaty*, consenting to humanitarian demining assistance may be necessary to fulfil their obligations to remove all anti-personnel mines on their territory. While a member State could argue that it is unable to fulfil this obligation in situations where part of its territory is controlled by a non-State armed group, it is "bound to make 'good faith' efforts to perform its treaty obligations",³⁸⁰ which would include an obligation not to actively frustrate humanitarian demining efforts in the territory controlled by the non-State armed group and not refusing to provide its consent simply on the basis that it does not wish to legitimise the group.

With regard to non-State territorial authorities, the Report notes that Geneva Call has been successful in working with such groups to promote the five pillars of mine action and provides that, as of 2006, 35 non-State groups had banned anti-personnel mines, 31 of which had signed the Deed of Commitment, and that a further 14 had "allegedly introduced some type of limitations (temporal or applied) to their mine use".³⁸¹ The Report claims that, under the contemporary state of the law, a non-State armed group may agree to ban anti-personnel landmines to protect the civilian population irrespective of the legal position of the State in which the armed group is controlling territory. The GICHD argue that engagement with non-State armed groups to protect civilian life and facilitate essential humanitarian aid is often necessary even where the cooperation of the affected State is not forthcoming. Where non-State armed groups have made commitments to remove anti-personnel mines, there is a greater chance that they will consent to humanitarian demining assistance in order to fulfil their obligations. While the consent of the concerned State may still be required, there would be comparatively limited non-arbitrary reasons for doing so.

374. Geneva Call 2006 Report.

375. *Ibid*, Abstract.

376. *Ibid*, pp. 32-33.

377. The report highlights that NSAGs are rarely involved in stockpile destruction, sometimes because they have not agreed to a total ban on anti-personnel mines, and other times because they suffer from a lack of resources or cooperation by the State against which they are fighting.

378. *Ibid*, p. 32.

379. *Ibid*, pp. 42-43.

380. *Ibid*, p. 135.

381. *Ibid*, p. 130.

6.5 Duties and rights of control and supervision over demining operations if consent is provided

Obtaining consent is not the final legal step in the process of delivering humanitarian assistance. The territorial authority bears duties but also retains certain rights over the implementation phase of relief schemes. Control rights should be emphasised to the party to the conflict that is determining whether to grant access to humanitarian demining convoys. Similar to the assurances noted above, reminding a party to the conflict of their right of control over the convoy should help to assuage concerns that the demining operation or equipment will be misused.

6.5.1 Under IHL

As pointed out by the ICRC, “the obligation to allow and facilitate relief schemes is without prejudice to the entitlement of the relevant actors to control them”.³⁸² While medical humanitarian relief operations³⁸³ and food assistance relief operations³⁸⁴ benefit from a special protection in this regard, only the general rules will be examined here as these cover the implementation of humanitarian assistance in general, which as we have argued includes the delivery of humanitarian demining equipment.

6.5.1.1 International Armed Conflict

Initially article 23 of GC IV imposed on States parties to allow free passage of consignments of medical and religious supplies, food, and clothing. AP I extended this in terms of items (all supplies essential to the survival of the civilian population) and recipients (the whole civilian population under the control of a Party to the conflict and not merely certain vulnerable groups).³⁸⁵ The State party to the armed conflict **shall allow and facilitate rapid and unimpeded passage** of all relief consignments, even if these are destined for the civilian population of the adversary.³⁸⁶

The States parties to the armed conflict must protect relief consignments (against destruction, looting, banditry, riot, etc.) and facilitate their distribution.³⁸⁷

This obligation covers entry and movement through the country, taking into account conditions of circulation in the country, and requires the party to refrain from subjecting relief consignments to superfluous administrative formalities. Examples of adequate measures which may be adopted by the State to fulfil this obligation include simplified visa-procedures for personnel, lighter customs inspections, issuing permits, allowing the import and use of telecommunications equipment, and providing competent and sufficient State personnel at the required levels.³⁸⁸

However, the State may **prescribe technical arrangements, including search** of the relief consignments. Among other reasons, this may serve to reassure the State party to the armed conflict that the operation and the equipment is exclusively humanitarian, that the convoy does not contain weapons or military equipment, or that the medical equipment is of the requisite quality. Such technical arrangements must be applied in good faith, in that “their imposition or effect must not be arbitrary” within the meaning of arbitrary withholding of consent as described above.³⁸⁹ This requires taking into consideration the nature of the needs of the civilian population.³⁹⁰ The removal of medical supplies from humanitarian shipments could be considered as arbitrary where the needs are established and the quality of supplies is not in question.³⁹¹

The State Party to the conflict may prescribe that the distribution be made under the local **supervision** of a Protecting Power,³⁹² in order

382. ICRC, 2015 Challenges Report, p.30.

383. Oxford Guidance, para. 84-91.

384. Oxford Guidance, para. 92-96.

385. Art 69(1) and 70(1) of AP I; Swiss FDFA Handbook, p. 21.

386. Art 70(2) of AP I.

387. Art 70(4) of AP I and ICRC, Commentary of 1987, paras 2857-2865; Directly attacking objects involved in the provision of humanitarian assistance is a war crime in IAC, see 8(2)(b)(iii) of the Rome Statute.

388. See Oxford Guidance, paras. 59-64; ICRC, Commentary of 1987, para. 2829.

389. See section 6.3.1. above.

390. Art. 70(3)(a) of API; ICRC, Commentary of 1987, para. 2831; Oxford Guidance, paras. 65-72.

391. In the Syrian context, see the grave concerns expressed by the UNSC over removal of such medical supplies: UNSC Resolution 2139 (2014), para. 8.

392. Art. 70(3)(b) of API ; Note that the notion of “Protecting Power” nowadays it only refers to the ICRC, see ICRC, “Protecting Powers”, How does Law protect in War, <https://casebook.icrc.org/>.

to assure that the relief consignments reach their recipient.³⁹³ The State Party to the conflict may **not divert or delay** the forwarding of relief consignments except in cases of urgent necessity and in the interest of the civilian population they are destined for.³⁹⁴ Finally, States must encourage and facilitate international cooperation in the delivery of humanitarian assistance.³⁹⁵

All of these obligations, except that of protection, apply also to non-belligerent States.³⁹⁶

Under the law of Occupation, article 59(4) of GC IV provides that 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”. This is merely to verify that consignments are humanitarian in nature and must not be misused to unduly delay the forwarding of the aid.³⁹⁷ These rights should by no means constitute a way for the Occupying power to divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power”. These three cumulative conditions are designed to prevent the abuse of this exception.³⁹⁸

Under article 61(2) of GC IV, relief consignments in occupied territory shall be exempt from “all charges, taxes or customs duties **unless** these are necessary in the interests of the economy of the territory. The Occupying Power shall **facilitate the rapid distribution** of these consignments”.³⁹⁹

Finally, article 69(2) of AP I contains the duty of the Occupying Power to permit relief actions to be implemented without delay.

393. ICRC, Commentary of 1987, paras. 2840-2841 and 2853-2856.

394. Art. 70(3)(c) of AP I.

395. Art. 70(5) of AP I.

396. See the wording of Art. 70 of AP I and ICRC, Commentary of 1987, paras. 2790-2869.

397. ICRC, Commentary of 1958, pp. 322-323.

398. Art. 60 of GC IV; ICRC, Commentary of 1958, p. 324.

399. ICRC, Commentary of 1958, pp. 327-328.

6.5.1.2 Non-International Armed Conflict

Common Article 3(2) and article 18(2) of AP II do not address the duties and rights of supervision of parties to a NIAC but the applicable IHL in IAC is considered to be part of Customary IHL applicable also to NIAC.⁴⁰⁰ Under customary IHL, the following rules are binding on both State and non-State armed groups party to a conflict:

- humanitarian relief personnel must be respected and protected;
- objects used for humanitarian relief operations must be respected and protected;
- the parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control;
- and the parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted.⁴⁰¹

There is no written obligation for non-belligerent States to allow and facilitate rapid and unimpeded passage. However, it could be argued on the basis of the obligation under Common Article 1 to the Geneva Conventions to “ensure respect” for the Conventions, as well as on the basis of necessity so as to uphold the party’s consent to the delivery of humanitarian relief.⁴⁰²

6.5.2 Special protection for humanitarian missions

International and humanitarian missions facilitating demining with the consent of the affected State are afforded special protection under IHL from the effects of minefields, mined areas, mines, booby

400. Rule 55 of the ICRC Study on Customary IHL; Oxford Guidance, para. 56 and footnote 55; ICRC, Commentary of 2016, para. 839.

401. Rules 31, 32, 55, and 56 of the ICRC Study on Customary IHL; Oxford Guidance, para. 58.

402. ICRC, Commentary of 2016, para. 840.

traps, and other devices.⁴⁰³ These operations include UN peacekeeping missions and other forces established under Chapter VII of the UN Charter, UN fact-finding and humanitarian missions, ICRC missions, and any other impartial humanitarian mission, including but not limited to those of the Red Cross and Red Crescent Movement. State parties must take all necessary measures to ensure their protection and provide safe passage to carry out their duties.

This again illustrates that humanitarian demining is not only part of humanitarian assistance, it is also a prerequisite to it.⁴⁰⁴

6.5.3 Rights of control and supervision over humanitarian demining assistance

Once consent to a humanitarian demining operation has been granted, both the humanitarian demining actor and the territorial authority will have certain rights and obligations.

Regarding the humanitarian demining service provider, personnel and objects used for the mission are to be respected and protected. The personnel must however abide by the approval of the territorial authority, respect its security requirements, and not exceed the limits of its mission. Failure to fulfil these obligations may lead to the termination of the mission.

As for the affected State or territorial authority, it must allow and facilitate rapid and unimpeded passage of humanitarian demining operations, to respect and to protect personnel and objects, and to facilitate the mission, notably by allowing freedom movement within the territory under its control. Only in case of imperative military necessity may the activities of the relief personnel be limited, or their movements temporarily restricted. The territorial authority must not divert nor delay the forwarding of the humanitarian demining assistance except in cases of urgent necessity and in the interest of the civilian population.

The territorial authority has the right to prescribe technical arrangements, including search of

the convoy, to ensure that the equipment is humanitarian. Finally, it may request that the ICRC supervise the distribution of the humanitarian demining equipment.

These rights of control and supervision enable the concerned authority to remove equipment from humanitarian convoys on the basis that it is not humanitarian in nature or poses undue risk of providing a definite military advantage. The rights of supervision and control must be exercised in good faith. As discussed in section 2.2, the latitude to remove demining equipment will depend on the nature of the equipment, its intended destination, and the status of the hostilities.

A special UN monitoring mechanism to ensure the humanitarian nature of relief consignments, as has been used in the Syrian case, could be equipped with the expertise and knowledge to ensure that demining equipment, based on its nature and intended destination, serves a purely humanitarian purpose.

6.5.3.1 Location and timing

The location and timing of humanitarian demining operations during a conflict are essential to ensure that such conduct does not amount to an engagement in the hostilities by depriving the party to the conflict that laid the mines of a definite military advantage, as discussed in Section 5.3. Location and timing are equally relevant to the exercise of the affected State or territorial authority's rights of control and supervision.

In order to ensure that humanitarian demining equipment is not misappropriated by the opposing armed force, or that deactivated mines are not reused against them, the affected State or territorial authority is likely to want to exercise effective control over the location and timing of humanitarian demining operations. The relevant authority will seek to ensure that demining only takes place away from the conduct of hostilities in areas under its control so as to minimise the risk of interference from the opposing armed force. As previously discussed, these precautions will equally be mandated by the demining organisation itself to ensure the safety of its personnel and to maintain compliance with the principle of neutrality. The relevant authorities will also likely exercise control and supervision over the type of

⁴⁰³ Art. 12 of Protocol II to the Weapons Convention.

⁴⁰⁴ See the UNSC Resolutions on the delivery of humanitarian aid in Syria calling for the removal of all impediments to the provision of humanitarian assistance, including UNSC Resolution 2449 (2018), preamble, lit. 3.

demining equipment entering their territories so as to minimise the risk that it may be used against them.

6.5.3.2 Demining techniques and equipment

The equipment and techniques used in humanitarian demining reflect the above limitations regarding location and timing.⁴⁰⁵ Humanitarian demining operations “are neither intended nor equipped to deploy full security cordons or engage defensively”⁴⁰⁶ and therefore are incapable of demining in areas of active combat. Following active hostilities, humanitarian deminers must leave sufficient time to ensure that any remaining mines have been abandoned and are no longer serving a military objective.⁴⁰⁷ Humanitarian demining equipment and techniques, which predominantly rely on hand-held devices to slowly and carefully detect all mines within an area, are unsuitable to fulfil the functions of military demining, which aims to efficiently clear a path for the movement of troops using explosive line chargers, ploughs, and rollers that can be “deployed from behind armour and yield rapid results”.⁴⁰⁸ As noted by the GICHD: “The objective is normally to overcome the obstacle in the most efficient manner possible: for a minefield, this means crossing it rather than removing it. It also means taking the shortest practical route and clearing as little area as possible”.⁴⁰⁹ Other military demining equipment and techniques include: countermine (CM); Explosive Ordnance Disposal, (EOD) Active Range Clearance (ARC), and UXO Environmental Remediation (UER).⁴¹⁰

Meanwhile, the above military demining equipment and techniques are unsuitable to achieve the objectives of humanitarian demining, which aims for complete mine clearance, prioritises the safety of deminers, and is motivated by a humanitarian, non-military purpose. As previously stated, all demining equipment is technically capable of

qualifying as humanitarian demining equipment provided it is used by an impartial humanitarian organisation operating in accordance with the principles of humanity, neutrality, impartiality, and independence. However, practically speaking, certain demining equipment is more likely to be considered humanitarian in nature and successfully pass security checkpoints. The deciding factor is likely to be the extent to which the demining equipment intended for an exclusively humanitarian purpose could be misused for a military purpose. It is therefore essential for impartial humanitarian organisations to communicate effectively in assuring the State or territorial authority that the demining equipment will be strictly controlled and only used for a humanitarian purpose in areas away from the conduct of hostilities.

Notwithstanding, the affected State or territorial authority will exercise rights of control and supervision over demining equipment where it has consented to humanitarian demining assistance. There are three broad categories of humanitarian demining equipment: (1) personal protection equipment, which is mandated in all UN related demining operations and may be required under national legislation as well; (2) detection equipment; and (3) clearance equipment. In addition to these, demining operations may require transportation, general hard-ware tools and other equipment for operating in conflict zones. The table below provides an example of some of the common types of humanitarian demining equipment in each category. A rating of “high”, “medium”, or “low” is provided to indicate the likelihood that the equipment could be misused for a military purpose and consequently denied entry. The rating system is only designed to highlight the potential for mistrust of certain demining equipment (i.e. mechanical or explosive); it is not intended to operate as a set of rules. The most effective way to convince the State or territorial authority of the humanitarian nature of equipment and its compliance with the principle of neutrality is to demonstrate its specific purpose, location, and controlled operation.

⁴⁰⁵ GICHD, Equipment Catalogue, https://www.gichd.org/en/resources/equipment-catalogue/equipments/?tx_solr%5Bfilter%5D%5B3%5D=family%3A1.

⁴⁰⁶ McInnally and Risser (2017), p. 32; See also Trevelyan (2008).

⁴⁰⁷ Ibid.

⁴⁰⁸ GICHD, Mine Action: Lessons and Challenges (2005), p. 20.

⁴⁰⁹ Ibid.

⁴¹⁰ Maki K. HABIB, “Humanitarian Demining: The Problem, Difficulties, Priorities, Demining Technology and the Challenge for Robotics”, in Maki K. Habib (ed), *Humanitarian Demining Intech Open* (2008), https://www.intechopen.com/books/humanitarian_demining/, pp. 4-5.

Type of equipment	High probability of rejection	Medium Probability of rejection	Low Probability of rejection
Personal protection equipment. ⁴¹¹			Body armour; Eye protection; Facial masks; Eardrum protection; Blast resistant footwear
General detection equipment.		Mechanical detection equipment (remote or board operated).	Manual mine detectors; ⁴¹² Prodders and smart prodders; Shallow search metal detectors; Wide area and large loop detectors; Deep search locators; Magnetometers; Metal mine detectors (MMD); Unmanned survey tools; Animal Detection Systems (Mine Detection Dogs, Rats, or other species such as Bees).
Building detection equipment.			Hook and Line pulling equipment; Hand tools for manual entry; Weight droppers; Lighting tools; Working at height and access tools (like ladders and harnesses); Casualty evacuation equipment; Wire detection tools; Long range optics (like scopes and binoculars) Endoscopes; Tripwire feelers.
Clearance equipment/ techniques.	Explosive clearance equipment; Mechanical equipment; ⁴¹³ Remote Ground clearance machines (remote or on board operated); Mine detonation machines (remote or on board operated); Stockpile destruction machines (Armoured fire-fighting vehicles; Armoured engineer vehicles; Deflagration equipment)	Stockpile destruction (Nonel shock initiation system; Radio controlled initiator)	Manually defused or destroyed slowly using the objects own explosives, or manually removed.

⁴¹¹. GICHD, Equipment Catalogue, "Personnel Protection Equipment;" IMAS, Standards & Technical Notes, op. cit., "10.30 Personnel Protection Equipment".

⁴¹². GICHD, Equipment Catalogue, "Mine Detectors" and "Unmanned Systems" (for non-technical surveys).

⁴¹³. GICHD, Equipment Catalogue, "Mechanical Equipment".

As can be seen above, hand-held detection equipment and manual clearance techniques are the least likely to be misused for a military purpose due to their unsuitability to military demining operations. At the same time, hand-held demining equipment is the most suitable for humanitarian demining operations as it is still the best way of ensuring that an area is cleared to the requisite standard.

6.6 Summary

This section has considered the extent to which affected parties to an armed conflict are entitled to refuse offers of humanitarian demining assistance or remove the necessary demining equipment. In doing so, the following rules have been interpreted and applied: (1) as a general rule, humanitarian demining assistance is subject to the consent of the affected State; (2) consent is not required of an Occupying Power or pursuant to a binding UNSC Resolution overriding consent; (3) the affected State cannot arbitrarily withhold its consent; (4) humanitarian demining organisations should make assurances of stockpile destruction, non-apportionment of blame, and commitment to the fundamental principles of humanitarian assistance to obtain access; and (5) where consent is provided, the affected State is under an obligation to allow and facilitate unimpeded humanitarian access, but retains the rights of supervision and control. Where these rights are effectively communicated to the State, most humanitarian demining equipment should pass inspection.

7. CONSEQUENCES OF UNLAWFULLY IMPEDING HUMANITARIAN DEMINING

As demonstrated above, in situations where the affected State has failed to fulfil the needs of its civilian population due to the ongoing threat of abandoned anti-personnel mines, there are three possible scenarios in which the affected State will have acted unlawfully with respect to offers of humanitarian demining assistance:

1. Where the affected State has withheld its consent despite the fact that it is legally obliged to provide consent due to a situation of Occupation, or where it has impeded entry despite a binding UNSC Resolution demanding cross-border humanitarian relief;
2. Where the affected State withheld its consent and, due to the particular circumstances of the case, the decision to withhold consent was arbitrary; and
3. Where the affected State provided its consent but failed in its obligation to protect and facilitate the provision of humanitarian demining assistance.

This Section examines the consequences for failing any of the above obligations for both the affected State and the organisation offering humanitarian demining assistance.

In short, the consequences for the affected State is that its unlawful conduct will amount to an internationally wrongful act and may attract sanctions or countermeasures under international law. In extreme cases, its unlawful conduct could independently violate another rule of international law and attract State or individual criminal responsibility.

For the organisation offering humanitarian demining assistance, a binding UNSC Resolution demanding cross-border humanitarian relief permits the delivery of humanitarian assistance irrespective of the consent of the affected State. However, in all other cases, unlawful withholding of consent does not allow the organisation to proceed before obtaining actual consent,⁴¹⁴

except in exceptional circumstances. Delivering humanitarian assistance without the consent of the affected State, even if it is unlawfully withheld, is not explicitly authorised under international law. The possible exceptions are where the humanitarian assistance is delivered under the doctrine of necessity, or as a countermeasure in response to the unlawful conduct of the affected State.

It is hoped that, by defining humanitarian demining as a form of humanitarian assistance under IHL and attaching to it the associated legal rights and obligations, it will pressure parties to an armed conflict that are unwilling or unable to deal with the impact of abandoned mines to accept offers of humanitarian demining assistance.

7.1 Consequences for the affected State

If the affected State has unlawfully withheld its consent or failed to comply with its obligation to facilitate humanitarian demining assistance, it has committed an internationally wrongful act and may be liable to countermeasures or sanctions imposed by third States, international organisations, or intergovernmental organisations such as the UN or the EU.⁴¹⁵ In certain situations, the UN Security Council may resort to military enforcement action to ensure compliance with international law. The Security Council has to date resorted to the use of force to ensure the delivery of humanitarian assistance on two occasions: Resolutions 781 (1992) on the situation in Bosnia-Herzegovina and 794 (1992) on the situation in Somalia.⁴¹⁶

In exceptional cases, unlawfully withholding consent to humanitarian assistance or intentionally renegeing on the obligation to facilitate such assistance could independently amount to a violation of IHL or IHRL and entail State or individual criminal responsibility. For example, starvation of civilians as a method of warfare, including through wilfully impeding

⁴¹⁴. ICRC, 2015 Challenges Report.

⁴¹⁵. Oxford Guidance, paras. 133-138.

⁴¹⁶. Ibid, para. 135.

relief supplies, is a **war crime** under customary IHL applicable in both international and non-international armed conflict, as recently codified in the Rome Statute of the International Criminal Court.⁴¹⁷ Attacking persons or objects involved in the provision of humanitarian assistance is also a war crime under customary IHL applicable in both international and non-international armed conflict and codified in the Rome Statute.⁴¹⁸ Article 9 of the 1994 Convention on the protection of UN personnel requires that such conduct be made a crime under domestic law.⁴¹⁹ Wilfully directing attacks against civilian persons is a war crime under customary IHL applicable in all conflicts, as codified in the Rome Statute.⁴²⁰ With regard to the use of anti-personnel mines in an indiscriminate manner, it is a war crime under customary IHL to employ weapons which are inherently indiscriminate, although this is only codified in IACs in the Rome Statute.⁴²¹ Furthermore, as previously stated, parties are obliged under customary IHL to limit the indiscriminate effects of mines.

Intentionally impeding humanitarian demining assistance could, if conducted as part of a widespread and systematic attack directed against the civilian population, with knowledge of the attack, also amount to a **crime against humanity**. The most applicable would be the crime of extermination, which requires “the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”,⁴²² the crime of other inhumane acts which requires “acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”,⁴²³ or the crime of persecution.⁴²⁴ Deliberately inflicting

on a particular national, ethnical, racial or religious group conditions of life calculated to bring about its physical destruction in whole or in part would also amount to the crime of **genocide**.⁴²⁵ Both crimes against humanity and genocide can occur during armed conflict and in peacetime where IHL does not apply.

7.2 Consequences for organisations offering humanitarian demining assistance

The fact that an affected State’s decision to withhold consent is unlawful does not entitle organisations to provide humanitarian demining assistance without such consent, except in exceptional circumstances. Actors wishing to engage in the delivery of humanitarian assistance without prior consent expose themselves, at a minimum, for violating the domestic law of the affected State. Humanitarian relief personnel, supplies and equipment would not lose their protection against direct attack as civilian persons and objects,⁴²⁶ but the responsible authority would not be under the obligation to allow and facilitate passage.⁴²⁷

The nature of the legal consequences they face depends on the nature of the actor in question. Private actors, such as NGOs and individuals, are not direct subjects of public international law⁴²⁸ and less likely to be held accountable for violations thereof, unless their conduct amounts to an international crime. Much more likely is the risk that they commit violations of the domestic law of the State concerned and expose themselves to the consequences before its national authorities. NGOs must also consider the rules contained in their internal regulations and funding agreements. States providing mere financial or other material support to such organisations would also not be liable under international law for the unlawful conduct of the organisation, as attribution requires a State to exercise “effective control”, which requires that the State “directed or enforced the perpetration of the acts contrary to human rights

⁴¹⁷ Art. 8(2)(b)(xxv) of the Rome Statute; Art. 54 of AP I (applicable in IAC); Art. 8(2)(e)(xix) of the Rome Statute, since the Resolution adopted at the 18th session of the Assembly of States Parties on 6 December 2019. See ICC, Assembly of the States Parties, Resolution on amendments to article 8 of the Rome Statute of the International Criminal Court, ICC-ASP/18/Res.5 (6 December 2019), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res5-ENG.pdf; and Art. 14(2) APII (applicable in NIAC).

⁴¹⁸ Art. 8(b)(iii) and 8(e)(iii) of the Rome Statute.

⁴¹⁹ Swiss FDFA Handbook, p. 41.

⁴²⁰ Arts. 8(2)(b)(ii) and 8(2)(e)(i) of the Rome Statute.

⁴²¹ Art. 8(2)(b)(xx) of the Rome Statute.

⁴²² Art. 7(1)(k) of the Rome Statute.

⁴²³ Art. 7(1)(h) of the Rome Statute.

⁴²⁴ Art. 6 of the Rome Statute.

⁴²⁵ Art. 6 of the Rome Statute.

⁴²⁶ Which would only occur if and for such time as they take direct participation in hostilities.

⁴²⁷ See section 6.5.

⁴²⁸ Malcolm N. SHAW, *International Law*, 6th edition, Cambridge University Press, 2008, p. 258

and humanitarian law alleged by the [affected] State”.⁴²⁹

States and International Organisations are primary subjects of public international law and their conduct can attract State responsibility. However, it is not clear whether lack of consent to impartial humanitarian assistance, delivered in accordance with the fundamental principles, is sufficient to render such assistance an unlawful interference in the sovereignty and territorial integrity of the affected State. According to the International Court of Justice in Nicaragua, “[t]here 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” provided that “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’”.⁴³⁰ This interpretation also finds support in IHL treaty instruments.⁴³¹

However, not everyone shares this view, and there is the possibility that providing humanitarian assistance without consent may violate the territorial integrity of the affected State. Either way, if States or International Organisations provided humanitarian assistance in violation of the fundamental principles, they would incur international responsibility.⁴³²

Notwithstanding the above discussion on the legality of unconsented to humanitarian assistance, there are two situations where international law explicitly permits the delivery of humanitarian assistance without consent. The first is where the requirement of consent has been overridden

by a binding UNSC Resolution, as was the case in Syria.⁴³³ Pursuant to such authority from the Security Council, relief organisations may provide humanitarian assistance in accordance with the fundamental principles, irrespective of the position of the affected State.

The second exception is covered by the so-called ‘circumstances precluding wrongfulness’, which in this case would include the doctrines of necessity⁴³⁴ and countermeasures.⁴³⁵ Necessity “may be invoked by a state or an international organisation to justify an otherwise wrongful act, if that act was the only way for it to safeguard an essential interest against a grave and imminent peril; and it does not seriously impair an essential interest of the injured state or of the international community”.⁴³⁶ Taking action to protect civilians from the indiscriminate effect of mines and preventing a humanitarian catastrophe by clearing access for the delivery of essential aid can be considered an “essential interest of the international community” and would therefore fall within the ambit of the doctrine of necessity.⁴³⁷ However, the territorial integrity of the affected State is also an “essential interest” of that State. Humanitarian mine action would require exercising control over a portion of the affected State’s territory for a prolonged period of time and is therefore likely to constitute an undue impairment on the essential interests of that State, rendering the doctrine of necessity inapplicable.⁴³⁸ However, it could be argued that the affected State’s “essential interests” are not so affected where the demining takes place on territory controlled by the armed group under the doctrine of necessity. Furthermore, less invasive measures, such as providing the necessary humanitarian demining equipment and training, would arguably not sufficiently impair the State’s essential interest and may therefore be permitted. Necessity only applies where there are no alternative (legal) means of addressing the essential interest. Accordingly, if the humanitarian demining assistance could be delivered through a different organisation that

⁴²⁹ ICJ Nicaragua judgment, para. 115 ; DARSIIWA, 47, para. 5.

⁴³⁰ ICJ Nicaragua judgment, paras. 242-243.

⁴³¹ Arts. 64 and 70 of AP I.

⁴³² International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, A/56/10 (November 2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (hereafter DARSIIWA), Art. 1; International Law Commission, Draft Articles on the Responsibility of International Organizations, A/66/10 (3 June 2011), https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf (hereafter DARIO), Art. 3.

⁴³³ See section 6.2.2 above.

⁴³⁴ Art. 25 of the DARSIIWA; Art. 25 of the DARIO; Oxford Guidance, paras. 146-151.

⁴³⁵ Art. 22 of the DARSIIWA; Art. 22 of the DARIO; Oxford Guidance, paras. 152-157.

⁴³⁶ Oxford Guidance, para. 146, paraphrasing article 25 of the DARSIIWA.

⁴³⁷ Ibid, para. 147.

⁴³⁸ Ibid, para. 148.

has the requisite consent of the affected State, necessity will not apply.

Finally, organisations could conceivably provide humanitarian demining assistance in the absence of consent where it is considered a proportionate countermeasure to the unlawful conduct of the affected State. There are several restrictions on the right to enact countermeasures, most notably the fact that they must be enacted by a State or international organisation injured by the unlawful conduct of another State for the purposes of inducing compliance with international law. However, there is growing acceptance of the notion that States or organisations can take countermeasures in the collective interest, irrespective of the fact that they have not been directly injured themselves. This concept opens the door for the provision of humanitarian assistance as a countermeasure where the unlawful conduct of the State has injured the collective interests of the international community by denying citizens their rights under IHL and IHRL. As Stated by one commentator, “[i]f the arbitrary refusal persists after fruitless negotiations, any relief action undertaken despite that refusal can, at least when undertaken by a third-party State, be regarded as a legitimate countermeasure and therefore does not constitute interference”.⁴³⁹

7.3 Summary

The legal remedies to be used against a State unlawfully withholding consent to humanitarian assistance are limited, and the legal risks of conducting an operation without consent are high. Practically, humanitarian demining is only likely to occur with the consent of the affected State or territorial authority. It will often be too dangerous to attempt any such operation without consent in the context of an armed conflict. In exceptional circumstances, either pursuant to a UNSC Resolution or under the doctrines of necessity or countermeasures, or where assistance is provided to a territorial authority without the express consent of the affected State, humanitarian demining assistance can potentially be delivered in response to an unlawful decision to withhold consent.

Outside of these exceptional circumstances, delivering humanitarian demining assistance without the consent of the affected State risks violating domestic and international law. While humanitarian actors should be aware of these legal consequences, the decision to deliver aid or not will most likely be made based on policy, operational, and security considerations.

Given the risks of operating without consent, it is recommended that organisations obtain the consent of the territorial authority by reminding it of its rights over the implementation, supervision and control over the provision of humanitarian assistance, and by demonstrating the organisation’s commitment to the principles of humanity, impartiality, neutrality, and independence.

⁴³⁹ Plattner (1996), op. cit.

8. CONCLUSION AND RECOMMENDATIONS

This Brief has shown that humanitarian demining can be classified as humanitarian assistance and the equipment can be classified as essential to the survival of the civilian population, providing it complies with the fundamental principles of humanity, impartiality, neutrality, and independence. Where the party to the conflict does not fulfill the civilian population's needs for humanitarian demining under its control, impartial humanitarian organisation and neutral third States may offer humanitarian demining services. Such offers should not be perceived as an interference in the domestic affairs of the State or a participation in the armed conflict.

Since parties to the armed conflict are often reluctant to allow humanitarian demining equipment to be part of humanitarian assistance convoys in concern that the enemy will gain a military advantage from such humanitarian action, the following recommendations may assist humanitarian demining actors to improve access for their personnel and equipment and conditions of implementation of their operations:

1. Seek a high level of trust and communication with the territorial authority.
2. Conduct a factual, case-by-case assessment that humanitarian demining and associated equipment is essential to the survival of the civilian population and qualifies as a form of humanitarian assistance in accordance with the fundamental principles of humanity, impartiality, neutrality, and independence.
3. Demonstrate that the offer of services complies with humanitarian principles.
4. Conduct preliminary research to ensure that the demining equipment is appropriate for the particular circumstances, and train personnel and recipients to the use of the equipment.
5. During an armed conflict, provide assurances that the equipment used for humanitarian demining will be for the sole benefit of the civilian population. Choose equipment which has lower probability of being misused for a military purpose; limit humanitarian demining operations to civilian areas away from the conduct of hostilities; and adapt the timing of operations to begin after the end of active hostilities.
6. Communicate with the relevant authorities that removing abandoned anti-personnel mines that are likely to have an indiscriminate effect is necessary to comply with that party's obligation under customary IHL to limit the indiscriminate effect of mines and therefore does not provide or deprive any party of a definite military advantage.
7. Where possible, seek consent from all concerned parties to the conflict when providing humanitarian assistance in the context of a non-international armed conflict. In some situations, it may be sufficient to obtain the consent of party to the conflict controlling the relevant territory where it can be accessed directly.
8. Communicate to relevant authorities their rights of control and supervision.
9. Insist on the quality and humanitarian nature of the demining equipment, its purpose and destination, to reduce margin of appreciation of the territorial authority to remove such equipment. Provide assurances to the territorial authority that cleared mines will be destroyed so as to remove the possibility that they could be reused by an opposing armed force.
10. Where compatible with the organisation's mandate, provide assurances that the humanitarian demining organisation is not seeking to apportion blame or publicly denounce the violations of international law which it may discover in the field.

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