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SERVITUS HUMANITATIS: BRIDGING THE REMEDIAL GAP IN CROSS-BORDER HUMANITARIAN RELIEF

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I. ABSTRACT

*Armed conflict frequently produces civilian starvation, medical deprivation and restricted access to essential relief. International humanitarian law permits impartial humanitarian actors to offer assistance, but cross-border relief ordinarily remains conditioned on the consent of the territorial State or the parties concerned. The difficulty arises where consent is refused or delayed without lawful justification while civilians remain in urgent need. This article adopts a doctrinal legal method, examining treaty rules, customary international humanitarian law, judicial authority, United Nations practice and secondary rules on State responsibility. It considers five possible legal bases for overcoming obstructive refusal: the consent framework under humanitarian law, Security Council authorisation, necessity under Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts, abuse of rights and the relevance of peremptory norms, particularly where starvation is used as a method of warfare. The article finds that each basis performs an important but limited function. Humanitarian law restricts arbitrary withholding of consent but does not itself create a general right of territorial entry. Security Council authorisation may permit cross-border relief, but its availability depends on political agreement. Necessity is exceptional and temporary, while abuse of rights and peremptory norms may establish wrongfulness without supplying a complete operational remedy. The article therefore identifies a remedial gap between the illegality of arbitrary refusal and the absence of a standing, non-forcible access mechanism. It proposes **Servitus Humanitatis** as *lex ferenda*: a treaty-based regime allowing strictly humanitarian, non-forcible and time-bound cross-border access after independent verification. The proposed Independent Humanitarian Arbitrariness Verification Commission would assess urgency, arbitrariness, alternatives and safeguards before relief proceeds.*

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II. KEYWORDS

Humanitarian relief; Arbitrary withholding of consent; Territorial sovereignty; Necessity; Servitus Humanitatis.

III. INTRODUCTION

The emergence of war often creates serious consequences, especially the inability of civilians to access food, water, and good medical care, which makes surviving difficult unless there is intervention by the government or humanitarian assistance by foreign bodies to the victims.² Over the years, international humanitarian law has grown from the recognition that the fracas of war cannot be given priority over human life. International humanitarian law acknowledges armed conflicts and has developed rules to ensure that even in the midst of war, human rights are preserved.³ Thus, by way of humanitarian reliefs, it has ensured the consistent delivery of food and medicine to victims of war crimes in locations where the incidence of war would have otherwise made it impossible.⁴

Territorial sovereignty gives a State exclusive competence within its territory, but that competence is not the same as absolute or unqualified control. In *Island of Palmas*, the award recognised territorial sovereignty as involving the exclusive right to display State activities, while also attaching to that right a corollary duty to protect within the territory the rights of other States. This includes the authority to regulate territorial access, even during national instability and crisis, but such authority must be exercised consistently with applicable international obligations. Acknowledging humanitarian relief without territorial consent can create a fundamental problem, especially where it risks being interpreted as an intrusion into sovereign territory

² International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2024) 106 *International Review of the Red Cross* 1357, 1404 <https://doi.org/10.1017/S181638312400064X> accessed 14 September 2026.

³ O W Igwe, C G Ofori and O D Michael, 'Reconciling International Humanitarian Law and Human Rights Law: Legal Tensions and Enforcement Challenges in Contemporary Armed Conflicts with Reference to Nigeria and Democratic Republic of Congo' (2025) 3(3) *LawFoyer International Journal of Doctrinal Legal Research* 739, 741.

⁴ Rebecca Barber, 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' (2009) 91 *International Review of the Red Cross* 371, 371–372 <https://doi.org/10.1017/S1816383109990154> accessed 14 September 2026.

under the guise of benevolence. Thus, while humanitarian relief is most appropriate for victims of armed conflict, territorial sovereignty must be understood as exclusive competence conditioned by international law.

Common Article 3 of the Geneva Conventions recognizes the right of an impartial humanitarian body to approach the parties to a non-international armed conflict with an offer of humanitarian services.⁵ Article 70(1) of Additional Protocol I similarly permits humanitarian relief where the civilian population is not adequately supplied, but the operation remains dependent on the agreement of the parties concerned.⁶ Interestingly, Article 18(2) of Additional Protocol II also makes relief for civilians who lack essential supplies subject to the consent of the High Contracting Party concerned.⁷ These provisions make State consent a central requirement for humanitarian relief operations, but the discretion to grant, withhold or condition consent is not unlimited. It is better understood as a conditioned discretion governed by the humanitarian obligations attached to the relief. International humanitarian law therefore requires consent for qualifying relief operations while also prohibiting consent from being withheld arbitrarily.⁸

The issue of consent has also so far remained unresolved. The 2016 commentary of the International Committee of the Red Cross explains that the discretion of a party faced with an offer of humanitarian services is no longer unlimited⁹. Also, Gillard is of the view that a party refusing consent must have a valid basis for doing so. This is to ensure that consent to humanitarian aid is not withheld arbitrarily.¹⁰ According to

⁵ Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, common art 3(2).

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I), art 70(1).

⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (AP II), art 18(2).

⁸ International Committee of the Red Cross, 'Article 3: Conflicts not of an international character – Commentary of 2016' in *Commentary on the First Geneva Convention* (ICRC 2016) paras 833–839 <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016> accessed 14 September 2026.

⁹ ICRC Commentary on Common Article 3 (n 11) paras 833–839.

¹⁰ Emanuela-Chiara Gillard (n 6) 359–362.

Gillard and Akande, arbitrariness may arise where a refusal is inconsistent with the international obligations of the party, goes beyond what necessity permits, or is otherwise unreasonable.¹¹ Their position ties arbitrariness to legal obligation rather than moral indignation. For example, security concerns may justify withholding consent, check consignments, or delay the delivery of reliefs.¹² However, where civilians face acute deprivation, a refusal unsupported by a lawful reason may fall within the prohibition against arbitrary withholding.¹³

An unlawful refusal does not necessarily clothe an assisting State or humanitarian actor with an automatic right of territorial entry. Schaffer argues that, although the law on humanitarian access continues to develop, a general right of access has not crystallised; more specifically, humanitarian actors do not enjoy a general right of access under the Geneva Conventions merely because consent has been arbitrarily withheld.¹⁴ In other words, the illegality of the refusal, standing alone, does not create a new legal title for the assisting actor to enter the territory. Thus, while the territorial State may incur responsibility for arbitrary refusal, the assisting actor still requires a separate legal basis for physical entry to deliver humanitarian relief.¹⁵

The refusal of humanitarian relief is however clearly regulated by current law; although there still exists a lacuna as to valid means of overcoming an unlawful refusal.¹⁶ The action of the Security Council and necessity answers part of the problem, but none of them offers a clear regime that guarantees access where refusal persists.¹⁷ The proposal developed later in this paper proceeds from that very gap, and it is defended as future law rather than a rule that is found in sovereignty or the law of responsibility.

¹¹ Dapo Akande and Emanuela-Chiara Gillard, 'Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict' (2016) 92 *International Law Studies* 483, 510.

¹² ICRC Commentary on Common Article 3 (n 11) para 839.

¹³ ICRC Commentary on Common Article 3 (n 11) paras 833–839.

¹⁴ Jessica Schaffer, 'State Consent to the Provision of Humanitarian Assistance in Non-International Armed Conflicts' (2021) 40 *University of Queensland Law Journal* 67, 67, 69 and 84.

¹⁵ Dapo Akande and Emanuela-Chiara Gillard, *Oxford Guidance* (n 18) paras 139–142.

¹⁶ Jessica Schaffer (n 17) 84–89.

¹⁷ Dapo Akande and Emanuela-Chiara Gillard, *Oxford Guidance* (n 18) para 139.

A. Research Objectives

This paper examines the legal consequences of an arbitrary refusal of consent to cross-border humanitarian relief during armed conflict. It seeks to determine whether existing international law provides a clear non-forcible right of access where civilians face acute deprivation and territorial consent is unlawfully withheld. It further proposes a treaty-based mechanism, *Servitus Humanitatis*, supported by independent verification, as a possible response to the remedial gap identified in the present legal framework.

B. Research Questions

This paper is guided by the following research questions:

1. Does international humanitarian law confer on an assisting State, international organisation or humanitarian actor a right of territorial entry where consent to humanitarian relief is arbitrarily withheld?
2. Do Security Council authorisation, necessity under the law of responsibility, abuse of rights or peremptory norms supply a sufficient legal basis for cross-border humanitarian relief without territorial consent?
3. What non-forcible legal and institutional mechanism could close the remedial gap between unlawful refusal of consent and timely humanitarian access?

C. Research Methodology

This paper adopts a doctrinal legal research method. It analyses treaty provisions on humanitarian relief and consent, including Common Article 3 of the Geneva Conventions, Article 70 of Additional Protocol I and Article 18(2) of Additional Protocol II. It also examines customary international humanitarian law, Security Council practice on cross-border humanitarian assistance, the International Court of Justice's treatment of sovereignty and humanitarian assistance, and secondary rules on necessity under the law of State responsibility.

The analysis is supported by relevant academic commentary and institutional guidance in order to assess whether present international law supplies a general remedy where consent is withheld arbitrarily.

IV. CONSENT AND HUMANITARIAN RELIEF UNDER INTERNATIONAL HUMANITARIAN LAW

A. International Armed Conflict, Occupation and the Scope of the Consent Rule

In international armed conflict, Article 70(1) of Additional Protocol I provides that where the civilian population of any territory under the control of a party to the conflict, other than occupied territory, is not adequately supplied with essential goods, humanitarian and impartial relief actions shall be undertaken, subject to the agreement of the parties concerned. This provision therefore preserves consent as the general rule for relief operations in non-occupied territory during international armed conflict.

Occupied territory, however, is governed by a distinct legal framework. Under Article 59 of the Fourth Geneva Convention, where the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power must agree to relief schemes on behalf of that population and must facilitate them by all means at its disposal. Article 23 of the Fourth Geneva Convention also addresses the free passage of essential consignments, while Articles 69 to 71 of Additional Protocol I further regulate basic needs, relief actions and relief personnel in occupied territories. Accordingly, occupation is not merely another example of discretionary consent; it is a recognised exception in which the Occupying Power's latitude to refuse humanitarian relief is substantially curtailed by specific treaty obligations.

The thesis of this paper should therefore be understood as operating outside the occupation exception. Its principal focus is on non-international armed conflicts governed by Common Article 3 and Article 18(2) of Additional Protocol II, and on non-occupation situations in which territorial consent remains legally relevant but may be withheld arbitrarily. In such cases, the legal problem is not whether

humanitarian need exists, but whether present international law supplies a clear, general and non-forcible right of passage once consent has been unlawfully refused.

B. Consent, Arbitrary Withholding and Humanitarian Relief in Non-International Armed Conflict

Common Article 3 recognises that neutral and impartial humanitarian bodies, including the Red Cross, may offer humanitarian services to the parties to a non-international armed conflict.¹⁸ Article 18(2) of Additional Protocol II similarly addresses relief actions for civilians suffering undue hardship in non-international armed conflicts, but makes such actions subject to the consent of the High Contracting Party concerned. In international armed conflict outside occupation, Article 70(1) of Additional Protocol I also contemplates relief for an inadequately supplied civilian population, subject to the agreement of the parties concerned.¹⁹

The position differs in occupied territory, where Articles 23 and 59 of the Fourth Geneva Convention and Articles 69 to 71 of Additional Protocol I impose more specific obligations concerning essential supplies and relief actions. The point to make here is therefore narrower: outside occupation and binding Security Council authorisation, an offer to provide humanitarian relief does not automatically confer a general right of territorial entry. Physical entry into the State's territory remains regulated by consent and by any separate legal basis that may exist under international law.²⁰

Under Article 18(2) of Additional Protocol II, humanitarian reliefs sought to be granted to a party State are subject to the consent of the High Contracting Party.²¹ The provision deals with situations where there is serious civilian suffering due to want of essentials. The authority of the state party is required for this purpose; however, such authority must be exercised in line with the rules guiding the reduction of civilian hardship and humanitarian obligations.²²

¹⁸ Fourth Geneva Convention, common art 3(2).

¹⁹ AP I, art 70(1); see also art 70(2) on the duty to allow and facilitate rapid and unimpeded passage of relief consignments, equipment and personnel.

²⁰ Emanuela-Chiara Gillard (n 6) 355–363.

²¹ AP II, art 18(2).

²² ICRC Commentary on Common Article 3 (n 11) paras 833–839.

According to an ICRC commentary, a state party is allowed to assess and evaluate humanitarian reliefs and give consideration to security considerations before granting consent.²³ If a State decides to withhold consent, such refusal should be backed with a credible reason strong enough to proffer other solutions to alleviate civilian needs. However, where refusal to grant consent is done without any good reason and without consideration for civilian suffering, then it calls for serious consideration under the prohibition against arbitrary withholding.²⁴

Rule 55 of the ICRC Study on Customary International Humanitarian Law requires parties to permit humanitarian relief intended for civilians in need to move rapidly and without obstruction, provided that the relief is impartial and remains subject to the right of control of the parties.²⁵ The idea is that humanitarian reliefs should be subject to regulatory control of the state party; however, this kicks against arbitrary withholding of consent once civilian needs have arisen.²⁶

Barber also refers to a situation where a state party refuses to grant consent amidst civilian starvation and suffering.²⁷ The refusal must be measured alongside the rule of reason and the consequence it will have on the civilians.²⁸ Therefore, while a State may inspect humanitarian reliefs at its border or direct them to go through a different route, thereby causing delay, it is different from a pure blanket refusal.²⁹

Additionally, what is arbitrary depends on the reason for the refusal and the consequence it has on the citizens. Arbitrariness must be measured in line with existing legal obligations against starvation, human rights considerations, and good faith. As earlier established, examining humanitarian reliefs at a state border by a

²³ ICRC Commentary on Common Article 3 (n 11) para 839.

²⁴ ICRC Commentary on Common Article 3 (n 11) paras 833–839.

²⁵ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, vol 1: Rules* (CUP 2005) (CIHL Study) rule 55 <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule55>> accessed 15 August 2026.

²⁶ ICRC Commentary on Common Article 3 (n 11) paras 833–839.

²⁷ Rebecca Barber (n 4) 387.

²⁸ ICRC Commentary on Common Article 3 (n 11) paras 833–839.

²⁹ ICRC Commentary on Common Article 3 (n 11) para 839.

neutral party or directing them towards a different route for security reasons may not entirely be arbitrary, but a blanket refusal without reason suggests the contrary.³⁰

In non-international conflicts, the party State may have sovereignty and control over the international frontier but does not have such control over the internal locality of its territory. Armed groups sometimes control these locales and territories. Gal had criticized this situation, that is, the fit between existing humanitarian rules and armed groups with regards to their territories.³¹ The law therefore should account for the difference between the control of the frontier and actual control over access to reach the internal territories not controlled by the government.

Territorial control of a locality by an armed group is however not sovereignty in the pure legal sense. Where humanitarian reliefs move through the international frontier, it still would require the cooperation of the armed groups for the reliefs to reach the civilians.³² The question of State consent and the cooperation of the armed groups answer different legal problems.

V. THE LEGAL CONSEQUENCES OF AN UNLAWFUL REFUSAL

In *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice stated 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 otherwise contrary to international law.³³ The Court did not treat all aid labelled “humanitarian” as sufficient. Rather, it used the practice of the Red Cross as the benchmark for genuinely humanitarian assistance: the aid must be limited to the purposes of preventing and alleviating human suffering, protecting life and health, and ensuring respect for the human being.

It must also be given without discrimination to all in need, and not merely to one side or its dependants. Accordingly, *Nicaragua* supports the proposition that humanitarian

³⁰ ICRC Commentary on Common Article 3 (n 11) paras 833–839.

³¹ Tom Gal, 'Territorial Control by Armed Groups and the Regulation of Access to Humanitarian Assistance' (2017) 50 *Israel Law Review* 25, 25.

³² Tom Gal (n 36) 25–47.

³³ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14, 124–125, paras 242–243.

assistance must satisfy the criteria of humanity and non-discrimination before it can avoid characterisation as unlawful intervention.

Physical entry of personnel, aircraft, and vehicles still requires consent however. The Court in *Nicaragua* did not suggest that humanitarian actors can enter a state's territory without consent. Hence, while a vehicle or aircraft may carry humanitarian reliefs, the consent of the party State is still required to cross international frontier borders.³⁴

In the earlier case of *Corfu Channel*, however, the British warship entered Albanian waters for minesweeping without the consent of the Albanian government. The International Court of Justice emphasized that this amounted to a violation of sovereignty.³⁵ Minesweeping is different from an unarmed humanitarian convoy, therefore physical activities in a foreign country require consent.³⁶

Article 2(1) of the United Nations Charter proceeds on the sovereign equality of States, while Article 2(4) bars the threat or use of force directed against the territorial integrity or political independence of a State.³⁷ Purely humanitarian assistance still requires consent even though it does not fall within the ambit of the kind of force contemplated in Article 2(4).³⁸ Armed personnel who force entry into a border without authorization can trigger security issues, violence, and military intervention by the threatened State. The present consideration here relates to entry without the use of force. Where there is humanitarian intervention by way of force, it will require the important consideration of Article 2(4), the position of the Security Council, and other humanitarian doctrines of non-intervention.³⁹ Where *Servitus Humanitatis*, which is proposed in this work, ends, that is where forceful military entry begins.

³⁴ Emanuela-Chiara Gillard (n 6) 368–373.

³⁵ *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 35.

³⁶ Emanuela-Chiara Gillard (n 6) 368–373.

³⁷ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter), arts 2(1) and 2(4).

³⁸ Emanuela-Chiara Gillard (n 6) 368–373.

³⁹ Emanuela-Chiara Gillard (n 6) 368–373.

It is important to underscore that the identity of the actor accessing the state party affects the law that is applicable. The conduct of a State expected or attributed to an assisting State is interpreted in line with the obligation that it is clothed with and, in some instances, the Articles on Responsibility of States for Internationally Wrongful Acts.⁴⁰ Flowing from this, an international humanitarian body like the United Nations falls under the related body of secondary rules, including the 2011 Draft Articles on the Responsibility of International Organizations and their law on necessity.⁴¹

However, private humanitarian organizations such as Non-governmental Organizations are different; they do not acquire the legal status of a State merely because they are offering humanitarian reliefs. Thus, the applicable law on access, reliefs, and consent shifts depending on the identity of the party seeking access.⁴²

Where a non-governmental organization breaches municipal law, such as accessing a State's border without consent, it may face international consequences if its conduct is such that it is attributable to a State, or another rule of international law binds it in the capacity in which it operated.⁴³ In this situation, Article 25 of ARSIWA cannot be invoked by it as a general humanitarian permission.⁴⁴ In the same vein, an international organization must also abide by the rules regulating international organizations and the functions that international law has clothed it with.⁴⁵

The point here is that the wrong committed by a state party, such as withholding consent, does not justify every third-party act in response thereto. The identity of the party gaining entrance, the obligation it is sought to embark on in the State party, and the reason for it must all align with the applicable laws. The intention to provide

⁴⁰ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/56/10 (ARSIWA), arts 1-2 and ch V https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf accessed 20 August 2026.

⁴¹ International Law Commission, 'Draft Articles on the Responsibility of International Organizations, with Commentaries' (2011) UN Doc A/66/10 (ARIO), art 25.

⁴² Dapo Akande and Emanuela-Chiara Gillard, Oxford Guidance (n 18) paras 139-142.

⁴³ ARSIWA (n 45) art 8.

⁴⁴ Dapo Akande and Emanuela-Chiara Gillard, Oxford Guidance (n 18) paras 139-142.

⁴⁵ ARIO (n 46) arts 1 and 25.

humanitarian relief for the purpose of curbing starvation cannot necessarily override the requirements that the law demands.⁴⁶

VI. LEGAL BASES FOR CROSS-BORDER RELIEF WITHOUT TERRITORIAL CONSENT

The starting point for the discourse on the legal bases for cross-border relief without territorial consent requires an inquiry into Articles 24, 25 & 39 of the United Nations Charter. Articles 24 & 25 place the primary responsibility for the maintenance of international peace and security on the Security Council (Council), while Member States are required to give effect to binding decisions of the Council.⁴⁷ Article 39 then empowers the Council to determine whether a situation has crossed the threshold of a threat to the peace, breach of the peace or act of aggression.

Conflict-induced starvation has been treated by the Council as capable of engaging international peace and security⁴⁸, while the scale of humanitarian suffering in Somalia was expressly treated as a threat to international peace and security⁴⁹. Where the necessary threshold is met, Article 41 provides a basis for non-forcible measures, including a binding authorization for cross-border humanitarian relief without territorial consent.⁵⁰

Notably, in Resolution 2165 (2014), the Security Council treated the deteriorating humanitarian situation in Syria as a threat to peace and security in the region. It then authorised United Nations humanitarian agencies and their implementing partners to operate across conflict lines and through the border crossings of Bab al-Salam, Bab al-Hawa, Al Yarubiyah and Al-Ramtha so that humanitarian assistance could reach

⁴⁶ Dapo Akande and Emanuela-Chiara Gillard, Oxford Guidance (n 18) para 139.

⁴⁷ UN Charter, arts 24, 25 and 39.

⁴⁸ UNSC Res 2417 (24 May 2018) UN Doc S/RES/2417, preamble and paras 1–4 [https://undocs.org/S/RES/2417\(2018\)](https://undocs.org/S/RES/2417(2018)) accessed 14 September 2026.

⁴⁹ UNSC Res 794 (3 December 1992) UN Doc S/RES/794, preamble [https://undocs.org/S/RES/794\(1992\)](https://undocs.org/S/RES/794(1992)) accessed 14 September 2026.

⁵⁰ Emanuela-Chiara Gillard (n 6) 378.

persons in need throughout Syria. Syria therefore remains an important historical case study of Security Council-authorized cross-border relief without territorial consent.⁵¹

The Council's intervention was not intended to apply in perpetuity; its operation depended on renewal. In Resolution 2672, the Council extended the use of the Bab al-Hawa crossing until 10 July 2023.⁵² A further proposal failed at the Council's 9371st meeting on 11 July 2023, despite thirteen votes in favour, because the Russian Federation voted against it and China abstained.⁵³ After that veto, the legal and operational model shifted. The Syrian Government issued a letter on 13 July 2023 allowing United Nations use of Bab al-Hawa for six months, subject to conditions, and the United Nations subsequently moved towards a consent-based arrangement for cross-border operations. OCHA later recorded that, after the expiry of the Security Council authorisation, the Government of Syria granted the United Nations and its partners six-month permission to use Bab al-Hawa.⁵⁴

Subsequent developments require the Syrian example to be treated as a historical case study rather than a static present account. The Assad Government fell on 8 December 2024, and a transitional administration was thereafter established. In February 2025, reports concerning Security Council practice and humanitarian logistics recorded that the Syrian caretaker or transitional authorities extended permission for United Nations humanitarian assistance through Bab al-Hawa for an additional six months, until 7 August 2025. The available post-2024 material therefore does not remove the relevance of Syria to this paper's argument; rather, it confirms that the legal basis for access has shifted over time between Security Council authorisation and consent-based arrangements.

⁵¹ UNSC Res 2165 (14 July 2014) UN Doc S/RES/2165, paras 2–5.

⁵² UNSC Res 2672 (9 January 2023) UN Doc S/RES/2672, para 2.

⁵³ UNSC '9371st Meeting' (11 July 2023) UN Doc S/PV.9371, 4–5.

⁵⁴ UNSC, 'Letter dated 13 July 2023 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council' (13 July 2023) UN Doc S/2023/526.

A. Necessity under the Law of Responsibility

The principle guiding the application of necessity under the law of responsibility is provided in Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). Necessity is not a general permission for conduct that is inconsistent with an international obligation. Article 25(1) provides that necessity may preclude wrongfulness only where the act is the only way for the State to safeguard an essential interest against a grave and imminent peril, and where the act “does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”

In the context of cross-border humanitarian relief, the interest protected under Article 25(1)(a) must first be identified. It may be framed as the acting State’s essential interest, or more controversially as an essential interest of the international community in preventing acute civilian deprivation. That characterisation matters because it affects whether a third State can invoke necessity at all. Article 25(1)(b) then requires the proposed relief operation to be weighed against the territorial State’s essential interest in sovereignty and territorial integrity, as well as any relevant interest of the international community as a whole.⁵⁵

In *Gabčíkovo-Nagymaros*, the International Court of Justice accepted necessity as part of customary international law and warned that it “can only be accepted on an exceptional basis”.⁵⁶ Necessity has nevertheless been treated by some writers as a possible basis for precluding the wrongfulness of humanitarian assistance undertaken without territorial consent in extreme cases. Barber argues that, where overwhelming humanitarian need exists and the territorial State refuses consent, necessity may preclude the wrongfulness of otherwise unlawful humanitarian assistance.

Akande and Gillard also recognise that the law of State responsibility, including necessity, may be relevant to assessing the legal consequences of cross-border humanitarian relief where consent is arbitrarily withheld. Schaffer similarly considers

⁵⁵ ARSIWA, art 25 and commentary.

⁵⁶ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7, para 51.

necessity as one of the possible bases advanced for humanitarian access without consent, although she does not treat it as establishing a general right of access.

However, necessity remains insufficient as a standing legal basis for humanitarian access. Article 25 of ARSIWA is framed as an exceptional circumstance precluding wrongfulness, not as a primary rule conferring a right of entry. It applies only where the act is the only way for the State to safeguard an essential interest against a grave and imminent peril, and only where the act does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. Article 25(2) also excludes necessity where the relevant obligation precludes reliance on it or where the State invoking necessity has contributed to the situation.⁵⁷

Paddeu and Waibel's observation that the "only way" requirement is exceptionally difficult to satisfy is useful in illustrating the restrictive character of Article 25, although their analysis arises principally from investment-law disputes and macro-level crises rather than humanitarian access in armed conflict.⁵⁸ Accordingly, necessity may assist in exceptional cases, but it does not establish a continuing, general or institutionally supervised entitlement to cross-border humanitarian relief without consent.

Notwithstanding the circumstances in which necessity may be invoked to preclude the wrongfulness of an act, there is no continued entitlement to humanitarian access. Reliance on necessity lasts only for as long as the conditions required under Article 25(1) remain present. Once those circumstances cease, the underlying international obligation again requires compliance. Article 27 also preserves the question of compensation for any material loss caused by the conduct in question.⁵⁹

An international organisation may also seek to rely on necessity, but Article 25 of the Draft Articles on the Responsibility of International Organizations states the rule more

⁵⁷ ARSIWA (n 45) art 25(2).

⁵⁸ Federica Paddeu and Michael Waibel, 'Necessity 20 Years On: The Limits of Article 25' (2022) 37 *ICSID Review - Foreign Investment Law Journal* 160, 160
<<https://academic.oup.com/icsidreview/article/37/1-2/160/6611639>> accessed 26 August 2026.

⁵⁹ ARSIWA, art 27.

narrowly. Necessity may be invoked only where the act is the only means for the organisation to safeguard, against a grave and imminent peril, an essential interest of its member States or of the international community as a whole, and only where the organisation has, in accordance with international law, the function to protect the interest in question. The act must also not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. Accordingly, a United Nations organ or other international organisation cannot rely on necessity merely because a humanitarian crisis exists. It must also show that the protection of the relevant essential interest falls within its legal functions and that the proposed operation does not seriously impair the territorial State's sovereignty or other protected essential interests.

The requirement that an international organisation must have the legal function of protecting the relevant essential interest is therefore central to Article 25 of ARIO. The existence of grave and imminent peril does not, by itself, confer that function on the organisation. The function must already be traceable to international law, including the organisation's constituent instrument, mandate or other applicable legal authority. This requirement is particularly important in humanitarian access cases because it prevents necessity from becoming a free-standing authority for non-consensual territorial entry by any international body.⁶⁰

B. Countermeasures under the Law of State Responsibility

Countermeasures also require consideration as a possible legal basis for cross-border humanitarian relief without territorial consent. Article 22 of ARSIWA provides that the wrongfulness of an act not in conformity with an international obligation is precluded if and to the extent that the act constitutes a lawful countermeasure taken against a State responsible for an internationally wrongful act. Articles 49 to 54 then regulate the conditions under which countermeasures may be taken.

⁶⁰ ARIO (n 46) arts 1 and 25.

In principle, countermeasures are temporary and instrumental: they are adopted to induce the responsible State to comply with its international obligations, not to punish it or to create a permanent legal entitlement.

The main difficulty is that countermeasures are traditionally available to an injured State. Article 49 refers to countermeasures taken by an injured State against a State responsible for an internationally wrongful act. In the humanitarian relief context, however, the States wishing to deliver assistance may not themselves be the directly injured States.

Article 54 preserves the possibility of lawful measures by States other than an injured State where obligations are owed to a group of States or to the international community as a whole, but it does not clearly codify a general right of collective countermeasures by non-injured States. Schaffer therefore treats collective countermeasures by non-injured States as unsettled, while Gillard's work on cross-border relief also identifies countermeasures as relevant but limited within the broader law regulating relief operations.

Even if countermeasures were available, they would remain subject to important limits. They must be proportionate to the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. They must also comply with the limitations in Article 50 of ARSIWA, including the prohibition on the threat or use of force, obligations for the protection of fundamental human rights, obligations of a humanitarian character prohibiting reprisals, and peremptory norms of general international law. These limits are especially important in the humanitarian context because any relief operation must remain non-forcible, impartial and directed to civilian need.

Countermeasures therefore do not close the remedial gap identified in this paper. They may, in exceptional circumstances, help explain why certain non-forcible measures adopted in response to an unlawful refusal of consent are not wrongful. However, the unsettled status of collective countermeasures by non-injured States, together with the requirements of proportionality, temporariness and non-force,

prevents countermeasures from functioning as a clear general right of cross-border humanitarian passage.

C. Abuse of Rights and Sovereign Discretion

The doctrine of abuse of right proceeds on the basis that an otherwise lawful power may attract responsibility where it is exercised for an improper or unlawful end.⁶¹ Although sovereign discretion is well recognized, however, the doctrine of abuse of rights accesses the rationale for the exercise of discretion, with a view to ensuring that same is not exercised unlawfully. The application of this doctrine in international humanitarian law is relevant where a state exercises its sovereign discretion with the intention of causing starvation, discrimination or denying consent to humanitarian relief.⁶²

However, the application of abuse of rights is limited in scope. This was recognized by Byers who posited that the doctrine '*retains little scope for application in most areas of international law.*'⁶³ There are customary humanitarian rules that limit the manner in which sovereign discretion may be used against humanitarian assistance. For instance, the ICRC commentary requires a legally valid basis for refusing a qualifying humanitarian offer and recognizes only limited restrictions connected to military necessity, rather than an unrestricted power to block the relief operation.⁶⁴

Also, where the doctrine of abuse of rights is applied, it cannot form the only basis for intervention amidst wrongful exercise of sovereign discretion. There must be a legal basis for the violation of territorial sovereignty because unlawful exercise of sovereign discretion does not automatically equate to loss of territorial sovereignty of a state.⁶⁵

⁶¹ Michael Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 McGill Law Journal 389, 389–391 <https://lawjournal.mcgill.ca/article/abuse-of-rights-an-old-principle-a-new-age/> accessed 14 September 2026.

⁶² Dapo Akande and Emanuela-Chiara Gillard, Oxford Guidance (n 18) paras 43–51.

⁶³ Michael Byers (n 68) 391.

⁶⁴ ICRC Commentary on Common Article 3 (n 11) paras 833–839.

⁶⁵ Dapo Akande and Emanuela-Chiara Gillard, Oxford Guidance (n 18) para 139.

D. Starvation and Peremptory Norms

International humanitarian law prohibits the use of starvation of civilians as a method of warfare or combat. This prohibition is reflected not only in customary international humanitarian law, but also in treaty law. Article 54(1) of Additional Protocol I provides that starvation of civilians as a method of warfare is prohibited, while Article 14 of Additional Protocol II similarly prohibits starvation of civilians as a method of combat in non-international armed conflicts.⁶⁶

Restrictions on humanitarian relief, food or other objects indispensable to civilian survival therefore become unlawful where they are used for the prohibited purpose of starving civilians. This position is also consistent with the right to adequate food.⁶⁷ General Comment No 12 identifies interference with humanitarian food assistance during internal conflict or other emergency situations as one of the ways in which the right to food may be violated. It also requires positive action from the State to strengthen access to the resources and means of livelihood necessary for food security.⁶⁸ General Comment No 36 similarly requires reasonable positive measures against conditions that threaten life, including widespread hunger and deprivation.⁶⁹

The criminal-law framework reinforces the connection between starvation, relief obstruction and legal responsibility. In international armed conflict, Article 8(2)(b)(xxv) of the Rome Statute classifies as a war crime the intentional use of starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions. The Assembly of States Parties adopted a 2019 amendment to extend a corresponding starvation war crime to non-international armed conflicts through Article 8(2)(e)(xix). That amendment entered

⁶⁶ Jean-Marie Henckaerts and Louise Doswald-Beck (n 30) rule 53.

⁶⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 11.

⁶⁸ UN Committee on Economic, Social and Cultural Rights, 'General Comment No 12: The Right to Adequate Food (Art 11)' (12 May 1999) UN Doc E/C.12/1999/5, paras 15 and 19.

⁶⁹ UN Human Rights Committee, 'General Comment No 36: Article 6 (Right to Life)' (3 September 2019) UN Doc CCPR/C/GC/36, para 26.

into force on 14 October 2021, but, under Article 121(5) of the Rome Statute, it enters into force only for those States Parties that accept or ratify it one year after deposit of their instrument. Accordingly, the amendment strengthens the deterrent and accountability framework for non-international armed conflicts, but its application depends on the acceptance or ratification status of the relevant State Party.

Under international law, there exist legally recognised peremptory norms, otherwise known as *jus cogens*. These norms operate within the hierarchy of international law and are accepted and recognised by the international community of States as a whole as norms from which no derogation is permitted. The International Law Commission's 2022 Draft Conclusions identify a non-exhaustive list of such norms in Conclusion 23 and its Annex, including the prohibition of aggression, genocide, crimes against humanity, the basic rules of international humanitarian law, racial discrimination and apartheid, slavery, torture, and the right of self-determination.

It is important to highlight, however, that humanitarian access as such is not separately listed as an independent peremptory norm.⁷⁰ It is important to highlight that humanitarian access is not listed amongst these norms. The special character of peremptory norms means that ordinary circumstances precluding wrongfulness cannot be relied upon to excuse conduct that is inconsistent with an obligation arising from *jus cogens*. Article 26 of ARSIWA is apt on this position.⁷¹

Essentially, a State cannot rely on ordinary justifications to sustain conduct that conflicts with a peremptory obligation. Article 26 of ARSIWA confirms that circumstances precluding wrongfulness do not apply to conduct that is not in conformity with an obligation arising under a peremptory norm of general international law. Where there is a serious breach within the meaning of Article 40 of ARSIWA, Article 41 requires States to cooperate, through lawful means, to bring the

⁷⁰ International Law Commission, 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with Commentaries' (2022) UN Doc A/77/10, conclusion 23 and Annex.

https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf accessed 1 September 2026.

⁷¹ ARSIWA, art 26.

breach to an end, and not to recognise as lawful a situation created by the serious breach or render aid or assistance in maintaining that situation. The ILC's 2022 Draft Conclusions on jus cogens also restate these cooperation, non-recognition and non-assistance consequences in Conclusion 19.

VII. THE ABSENCE OF A GENERAL REMEDY IN PRESENT INTERNATIONAL LAW

When a party State arbitrarily withholds consent, it most often constitutes a breach of humanitarian law, human rights law, or both.⁷² However, according to the Oxford Guidance, the fact that the refusal is itself unlawful does not, without more, authorize the assisting State to enter the territory.⁷³ Schaffer also shared the same position: in non-international armed conflicts, an unlawful refusal does not by itself create a general entitlement of access⁷⁴ for the assisting State. A separate legal basis for entry is therefore still required.⁷⁵

There may be cessation and reparation where consent is refused arbitrarily, but those State-responsibility remedies often arrive late when civilians require food, water and medicine to survive immediately. International criminal law may add a deterrent and accountability dimension where obstruction of relief forms part of the intentional starvation of civilians, particularly under Article 8(2)(b)(xxv) of the Rome Statute in international armed conflict and, for accepting States Parties, Article 8(2)(e)(xix) in non-international armed conflict.

However, individual criminal liability does not itself create an immediate operational right of cross-border passage. Humanitarian deprivation therefore still creates an imbalance between recognising the unlawfulness of obstructive conduct and securing timely access to civilians in urgent need.

Recent International Court of Justice practice also illustrates both the strength and the limits of existing remedies. In its Order of 28 March 2024 in *South Africa v Israel*, the

⁷² ICRC Commentary on Common Article 3 (n 11) paras 833–839.

⁷³ Dapo Akande and Emanuela-Chiara Gillard, Oxford Guidance (n 18) para 139.

⁷⁴ Jessica Schaffer (n 17) 84–89.

⁷⁵ Dapo Akande and Emanuela-Chiara Gillard, Oxford Guidance (n 18) para 139.

Court unanimously indicated additional provisional measures requiring Israel to take all necessary and effective measures to ensure, without delay, the unhindered provision at scale of urgently needed basic services and humanitarian assistance to Palestinians throughout Gaza. The Court's later Order of 24 May 2024 further emphasised that the 28 March measure required maintaining open land crossing points, particularly the Rafah crossing, for the unhindered provision at scale of humanitarian assistance.

In its Advisory Opinion of 22 October 2025 on the obligations of Israel in relation to the presence and activities of the United Nations, other international organisations and third States in and in relation to the Occupied Palestinian Territory, the Court addressed the obligations of an occupying power and the mandate and activities of United Nations actors, including UNRWA. It found that Israel was obliged to agree to and facilitate relief schemes for the population of Gaza, in particular those provided by UNRWA, and not to impede such relief. These developments are important, but they do not displace the remedial gap identified in this paper. They arise in the special context of occupied territory and United Nations-mandated humanitarian activity, rather than a general entitlement of unilateral entry into a non-occupied State where consent has been arbitrarily withheld.

The phrase “no general remedy” in this section is therefore used in that narrower sense: outside occupation, binding Security Council authorisation, and specific UN-mandated arrangements, present international law still does not clearly establish a standing non-forcible right of cross-border humanitarian passage for an assisting State or humanitarian actor.

The Security Council's authorisation to access a State's territory is dependent on political agreement within the Council.⁷⁶ Necessity and countermeasures may, in exceptional circumstances, preclude the wrongfulness of conduct that would otherwise breach an international obligation, but neither doctrine supplies a clear general right of humanitarian passage. Necessity under Article 25 of ARSIWA is

⁷⁶ Graham Melling and Anne Dennett (n 60) 285–307.

exceptional, temporary and dependent on strict conditions, including the “only way” requirement. Countermeasures under Articles 22 and 49 to 54 of ARSIWA are likewise limited by the injured-State framework, proportionality, temporariness and the prohibition on force, while collective countermeasures by non-injured States remain unsettled.

Outside recognised exceptions such as occupied territory and binding Security Council authorisation, present international law does not establish a general legal regime that entitles an assisting State or humanitarian actor to cross-border entry merely because territorial consent has been withheld, even arbitrarily. In occupation, the legal framework is different because the Occupying Power is subject to specific duties under the Fourth Geneva Convention and Additional Protocol I concerning essential supplies, relief schemes and the facilitation of humanitarian assistance. The remedial gap addressed in this paper therefore concerns non-occupation situations, particularly non-international armed conflicts, where consent remains required but may be unlawfully refused without producing a clear, standing right of passage.⁷⁷

Servitus Humanitatis should be treated as *lex ferenda*. Its legal basis should be created through a multilateral convention adopted by States, whether through a diplomatic conference or through a General Assembly-facilitated treaty process, and then opened for signature, ratification, acceptance, approval or accession. Such a treaty would bind only States that consent to be bound by it, unless and until any of its provisions later crystallise into customary international law.

For non-party States, the proposed regime would not itself create a binding right of humanitarian passage, although it could still operate as a model for voluntary consent, Security Council action or future treaty development. The treaty should identify eligible humanitarian actors, define the triggering conditions, prescribe an independent verification process, regulate non-forcible entry, provide monitoring safeguards and specify when access must terminate.

⁷⁷ Dapo Akande and Emanuela-Chiara Gillard, *Oxford Guidance* (n 18) para 139.

VIII. SERVITUS HUMANITATIS AS LEX FERENDA

Servitus Humanitatis⁷⁸ is recommended as a future law in situations where a party State has arbitrarily withheld consent. Although existing international law recognizes humanitarian access and, in some cases, support access without State consent, it has failed to specify a clear mechanism for independent humanitarian assistance without State consent,⁷⁹ and thus have not necessarily considered Servitus Humanitatis as a possible customary international law for specific purposes like this. Even the provision in article 25 of ARSIWA is too restrictive to imply Servitus Humanitatis as an exception.⁸⁰

The term “servitude” is used here only by analogy. In classical international law, international servitudes were understood as rights or restrictions affecting the use of territory without necessarily transferring sovereignty over that territory. Brierly’s treatment of the territory of States recognises that international law has sometimes referred to rights over territory comparable to servitudes or easements in municipal law. In the present context, Servitus Humanitatis is not proposed as a proprietary claim over territory, nor as a diminution of the territorial title of the State concerned. It is proposed as a narrowly defined humanitarian passage mechanism which, if created by treaty, would respect the title, jurisdiction and international boundary of the territorial State while permitting temporary, non-forcible and monitored humanitarian access in strictly defined circumstances.

A. Doctrinal Basis of the Servitude Analogy

The analogy is supported by the International Court of Justice’s decision in *Right of Passage over Indian Territory*. In that case, Portugal claimed a right of passage between its coastal district of Daman and its enclaves of Dadra and Nagar-Aveli through Indian territory. The Court found that Portugal had, in 1954, a right of passage for private persons, civil officials and goods in general, to the extent necessary for the exercise of

⁷⁸ Andrew Clapham (ed), Brierly’s Law of Nations: An Introduction to the Role of International Law in International Relations (7th edn, OUP 2012), ‘The Territory of States’, doi:10.1093/law/9780199657933.001.0001.

⁷⁹ Jessica Schaffer (n 17) 84–89.

⁸⁰ Federica Paddeu and Michael Waibel (n 64) 160–191.

Portuguese sovereignty over the enclaves and subject to India's regulation and control. However, the Court held that the right did not extend to armed forces, armed police, arms or ammunition. The case therefore demonstrates that a passage right can coexist with the territorial sovereignty of the intervening State, provided the right is legally founded, limited in scope and subject to regulation and control by the territorial sovereign. The ICJ's official case summary records that Portugal's claimed right was subject to India's regulation and control, and that the Court excluded armed forces, armed police, arms and ammunition from the right of passage.

The legal title in *Right of Passage* arose from the particular historical practice accepted as law between the parties; it was not a general humanitarian right of access. That distinction is important. *Servitus Humanitatis* is not presented as an existing customary right comparable to Portugal's historically grounded passage claim. Rather, the case is useful because it shows the legal possibility of a narrowly limited passage right that does not extinguish or transfer territorial sovereignty. In the humanitarian context proposed in this paper, the equivalent legal title would have to be supplied by a future multilateral treaty. Such a treaty would define the conditions of access, the actors entitled to invoke it, the humanitarian purposes for which passage may be used, the monitoring powers of the territorial State, and the exclusion of military or forcible activity.

The servitude analogy therefore answers a likely objection to the proposed doctrine: that any right of passage necessarily implies a loss of sovereignty. *Right of Passage* shows that this does not necessarily follow. A passage right may impose a limited burden on the exercise of territorial sovereignty, but it need not displace title, jurisdiction or regulatory authority. For that reason, *Servitus Humanitatis* should be framed as a treaty-based, non-forcible, temporary and regulated humanitarian passage mechanism. It should expressly exclude armed forces, armed police, weapons, ammunition, territorial control and political intervention. Its purpose would be to enable humanitarian relief in defined circumstances, not to create a general licence for intervention.

States can enact multilateral instruments that recognize *Servitus Humanitatis*, setting clearly how an independent humanitarian body can gain access during conflicts. If this materializes, it can grow into a well-established customary international law.⁸¹ But before this is achieved, there should be a consistent push for *Servitus Humanitatis* as a future law, with a treaty setting out when it can be triggered and when humanitarian assistance can be provided when a State arbitrarily withholds consent without breaching existing laws. This will also ensure that it has its source from positive law.

The proposed regime should operate through a fixed sequence. First, the trigger stage would require proof that civilians face urgent deprivation of food, water, medicine or other indispensable relief; that a genuine humanitarian offer has been made; and that the territorial State has refused, delayed or conditioned consent without a legally sufficient reason. Secondly, the verification stage would require the Independent Humanitarian Arbitrariness Verification Commission to assess the facts, invite the territorial State to respond within a short emergency period, and determine whether the refusal is arbitrary.

The proposed treaty should set an outer response period, for example seventy-two hours in ordinary emergencies and twenty-four hours where there is an imminent risk of large-scale loss of life. Thirdly, the entry stage would arise only after verification and only where there is no reasonably available alternative route or negotiated arrangement capable of meeting the humanitarian need in time. Entry would not occur through force or unilateral self-help, but under the treaty-based authorisation created by the proposed regime. Negotiations with the territorial State should remain available at every stage, but failed negotiations should not be confused with consent once the treaty conditions for verified humanitarian passage have been satisfied.

For this purpose, an eligible independent humanitarian actor should be limited to a neutral and impartial humanitarian organisation recognised under the treaty, a United Nations humanitarian agency, or an implementing partner authorised and

⁸¹ International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (2018) UN Doc A/73/10, conclusion 11 and commentary.

supervised under the treaty framework. The actor must satisfy the *Nicaragua* criteria: the relief must be limited to the prevention and alleviation of human suffering, the protection of life and health, and respect for the human being, and it must be provided without discrimination to all civilians in need rather than to one party or group. The operation must also comply with the humanitarian and impartial character required by international humanitarian law.

All access under *Servitus Humanitatis* should be non-forcible, temporary, geographically limited and confined to the verified humanitarian purpose. It should exclude armed forces, armed police, weapons, ammunition, territorial control and political activity. The territorial State should retain regulatory powers compatible with the treaty, including inspection, route coordination, monitoring by neutral representatives and security arrangements that do not defeat the relief operation itself.

The proposed treaty should also specify termination rules. Access should cease when the territorial State gives workable consent and the relief can proceed effectively through an agreed arrangement; when the verified emergency no longer exists; when an alternative route becomes available; when the authorised time limit expires; or when the humanitarian actor materially breaches the treaty conditions. A standard authorisation should not exceed thirty days, subject to renewal by the IHAVC where urgent civilian need persists and the conditions for access remain satisfied. Emergency authorisation granted on a compressed timetable should be reviewed within seven days. No passage authorised under *Servitus Humanitatis* should mature into territorial control, occupation, political authority or any permanent right over the territory.

B. An Independent Humanitarian Arbitrariness Verification Commission (IHAVC)

Determining whether a State party has withheld consent arbitrarily is not a question that should be determined by the assisting State. While the party State may indicate security concerns as its reason for withholding consent, the assisting State may cite civilian starvation as a justification for encroachment. There needs to be established an independent commission that will assess every situation and determine whether

consent has been withheld arbitrarily and recommend the necessary measures to address it.

Article 22 of the United Nations Charter gives the General Assembly authority to establish subsidiary organs where their creation is necessary for the performance of its functions. That power must, however, be understood in light of the General Assembly's own competence. Under Article 10 of the Charter, the Assembly may discuss matters within the scope of the Charter and make recommendations to Member States or to the Security Council. Resolution 377A(V), *Uniting for Peace*, likewise permits the Assembly to make recommendations where lack of unanimity among the permanent members prevents the Security Council from discharging its primary responsibility for international peace and security.

General Assembly Resolution 76/262, the veto initiative, similarly recalls the Assembly's authority under Article 10 and strengthens deliberation after the use of a veto, but it does not confer binding enforcement authority on the Assembly. Accordingly, if the IHAVC is created only as a General Assembly subsidiary organ, its findings should be framed as recommendatory and evidentiary. They may assist States, United Nations organs, humanitarian actors and courts in assessing arbitrariness, but they cannot by themselves order binding third-party relief transit. Binding legal effect would arise only if States create the IHAVC through a treaty and accept that its determinations have specified legal consequences under that treaty.⁸²

Barber, in her work, suggested that the General Assembly "could play a role by making a legal determination" regarding necessity in line with humanitarian access⁸³. The Independent Humanitarian Arbitrariness Verification Commission recommended here will play a narrower role. The Commission will assess situations of withheld consent, the whole facts, and applicable law rapidly. The report of the

⁸² UN Charter (n 42) art 22.

⁸³ Rebecca J Barber, 'Does International Law Permit the Provision of Humanitarian Assistance Without Host State Consent? Territorial Integrity, Necessity and the Determinative Function of the General Assembly' in Terry D Gill and others (eds), *Yearbook of International Humanitarian Law*, vol 23 (TMC Asser Press 2022) 85, 85 https://doi.org/10.1007/978-94-6265-491-4_5 accessed 14 September 2026.

Commission can assist States, international organizations, the International Court of Justice, and the United Nations organs that are faced with the said dispute.

The Commission should sit permanently and be able to convene emergency proceedings to assess alleged denial of humanitarian access. Its members should include international lawyers, public health specialists, logisticians and experts in international humanitarian affairs. A request for verification may be submitted by the United Nations Secretary-General, a State Party to the proposed treaty, a United Nations humanitarian agency, or a qualified humanitarian organisation recognised under the treaty.

Upon receiving a request, the Commission should first determine whether the humanitarian actor is eligible and whether the civilian need is urgent. It should then notify the territorial State and invite a response within the treaty's emergency deadline. Where the State gives a lawful and workable alternative, the Commission should not authorise passage. Where the State refuses, fails to respond, gives reasons that are not legally sufficient, or imposes conditions that defeat timely relief, the Commission may issue an Arbitrariness Assessment Report confirming that the treaty conditions have been met.

Any recommendation for humanitarian passage should then be transmitted to the General Assembly and relevant humanitarian agencies, but the legal basis for passage would derive from the treaty obligations accepted by the State Parties, not from a free-standing power of the General Assembly to bind non-consenting States.

The inquiry by the Commission should examine five matters: the urgency and scale of civilian need; the neutrality, impartiality and capacity of the proposed humanitarian actor; the reasons advanced by the territorial State; the availability of alternative routes or negotiated arrangements; and the safeguards required to prevent diversion, military use or political manipulation of the relief operation. The Commission should then issue an Arbitrariness Assessment Report stating whether the threshold for treaty-based humanitarian passage has been satisfied and, if so, the authorised route, duration, categories of relief, monitoring arrangements and termination conditions.

If States become parties to a *Servitus Humanitatis* treaty and domesticate its obligations, domestic authorities may be required to cooperate with the IHAVC in gathering information, facilitating inspections, identifying secure routes and implementing safeguards. A domestic body should not replace the IHAVC in determining arbitrariness, because that would risk allowing the territorial State to judge its own refusal.

Instead, a domestic focal body could work alongside the IHAVC by supplying evidence, coordinating access to relevant officials, proposing alternative routes, facilitating border inspection and ensuring that treaty safeguards are implemented within the State's legal system. The final arbitrariness assessment should remain with the independent Commission, subject to notice, reasons and an opportunity for the territorial State to respond.

C. Operational Safeguards for Non-Forcible Cross-Border Relief

Resolution 2165 did not merely authorize cross-border relief in Syria; it also required notification of the Syrian authorities and established a monitoring arrangement under the authority of the Secretary-General.⁸⁴ Reliefs (consignments) going through *Servitus Humanitatis*, as recommended in this work, should go through verification, inspection and evident sealing before crossing the territorial border. In addition, the consignments will have an electronic GPS or satellite tracking device that will show the origin, route and content of the consignment and indicate where there is diversion. This will ensure consistent monitoring of the reliefs.

The distribution of relief should be monitored to ensure that consignments are not diverted to armed groups or used for military or political purposes. Humanitarian actors must remain neutral and impartial, and must deliver relief on the basis of need alone. The territorial State should be able to participate in inspection and route coordination through neutral representatives, provided that such participation does not defeat the timely delivery of relief. Resolution 2165 offers an important institutional precedent: the Security Council established a United Nations monitoring

⁸⁴ UNSC Res 2165 (n 56) paras 2–3.

mechanism under the authority of the Secretary-General to confirm the humanitarian nature of consignments crossing into Syria, while also providing for notification to the Syrian authorities. A *Servitus Humanitatis* treaty could adapt that model by requiring inspection, sealing, tracking, independent observation and post-delivery reporting. Breaches by humanitarian actors should lead to suspension, termination of authorisation, loss of recognised status, reporting to the treaty body, and any further consequences provided by the treaty. The term “sanctions” should be used only where the treaty itself confers such a power or where the Security Council acts under the Charter.

IX. SUGGESTIONS AND RECOMMENDATIONS

This paper recommends the development of *Servitus Humanitatis* as a future treaty-based legal regime for situations where a party State arbitrarily withholds consent to humanitarian relief. Existing international law recognises the importance of humanitarian access and, in limited cases, permits relief operations without territorial consent, particularly through binding Security Council authorisation and the specific rules applicable to occupied territory. However, outside those recognised exceptions, present international law does not provide a clear, general and non-forcible mechanism for independent humanitarian access where consent is unlawfully refused. Article 25 of ARSIWA is also too restrictive to operate as a general humanitarian access exception. *Servitus Humanitatis* is therefore proposed as *lex ferenda*, not as an existing rule of customary international law.

First, States should adopt a multilateral treaty recognising *Servitus Humanitatis* as a narrowly defined and non-forcible humanitarian access regime. The treaty should specify the actors entitled to invoke the regime, the conditions under which it may be triggered, the meaning of arbitrary withholding of consent, and the safeguards necessary to prevent abuse. The proposed regime should apply only where civilians face urgent deprivation, a genuine and impartial humanitarian offer has been made, and territorial consent has been refused, delayed or conditioned without lawful justification.

Secondly, the treaty should establish an Independent Humanitarian Arbitrariness Verification Commission to determine whether consent has in fact been withheld arbitrarily. The assessment should not be left solely to the assisting State or humanitarian actor, because that would risk undermining territorial sovereignty and politicising humanitarian access. The Commission should examine the urgency of civilian need, the reasons given by the territorial State, the availability of alternative routes, the neutrality of the proposed relief operation, and the proportionality of any restrictions imposed by the State concerned.

Thirdly, any access granted under *Servitus Humanitatis* should be temporary, geographically limited and strictly humanitarian. It should not authorise forcible entry, military intervention, territorial control or political interference. Relief consignments should be subject to verification, inspection, sealing, monitoring and route-tracking to ensure that assistance reaches civilians in need and is not diverted to armed groups or used for non-humanitarian purposes.

Finally, the proposed regime should preserve the balance between sovereignty and humanitarian necessity. It should not replace the ordinary requirement of consent but should operate as a carefully regulated exception where refusal of consent has become arbitrary and civilians face serious deprivation. In this way, *Servitus Humanitatis* would close the remedial gap identified in this paper while maintaining fidelity to the non-forcible character of humanitarian relief and the continuing relevance of territorial sovereignty.

X. CONCLUSION

International law must protect both territorial sovereignty and civilian rights during armed conflict. This paper's argument is confined to non-occupation situations, especially non-international armed conflicts, where humanitarian relief remains dependent on consent but that consent may not be withheld arbitrarily. Occupied territory is governed by a distinct treaty regime under the Fourth Geneva Convention and Additional Protocol I, and binding Security Council authorisation may also provide a separate basis for cross-border relief.

Outside those recognised exceptions, however, an arbitrary refusal of consent does not, by itself, vest an assisting State or humanitarian actor with a general authority to cross foreign borders.⁸⁵ The decision in Nicaragua, the authority of the Security Council, Article 25 of ARSIWA and existing peremptory norms all play a role in addressing this situation, but none of them as noted earlier has provided a clear and comprehensive solution to situations where consent is withheld arbitrarily when civilian suffering persists.⁸⁶

Servitus Humanitatis is therefore proposed as a possible *lex ferenda* response: a treaty-based, non-forcible and independently verified humanitarian passage mechanism for genuine humanitarian emergencies. The proposal does not replace the ordinary requirement of consent, nor does it convert arbitrary refusal into a licence for unilateral force or territorial control. Rather, it seeks to address the narrower remedial gap identified in this paper: the gap between the unlawfulness of arbitrary refusal and the absence of an immediate, lawful and operational access mechanism in non-occupation situations. The Syrian experience demonstrates that Security Council authorisation and consent-based arrangements may shift with political conditions, while recent ICJ practice concerning Gaza confirms the importance of duties to facilitate humanitarian relief in occupied territory and in relation to United Nations-mandated actors. Those developments strengthen, rather than displace, the need to define the proposal carefully.

Servitus Humanitatis should therefore remain limited to future law, dependent on State acceptance through a multilateral treaty, and applicable only to States that consent to be bound by it unless its rules later crystallise into customary international law. Properly confined, the framework would help ensure that arbitrariness does not become a permanent barrier to humanitarian assistance while preserving territorial sovereignty, non-force and the exceptional character of non-consensual humanitarian passage.

⁸⁵ Dapo Akande and Emanuela-Chiara Gillard, Oxford Guidance (n 18) para 139.

⁸⁶ Jessica Schaffer (n 17) 84–89.

XI. REFERENCES

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