

**SUBSTANTIVE TECHNICALITIES: UNDERSTANDING THE
LEGAL FRAMEWORK OF HUMANITARIAN ASSISTANCE IN
ARMED CONFLICTS THROUGH THE PRESCRIPTION OF
TECHNICAL ARRANGEMENTS**

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I. Introduction

Whether one adheres to the view of the Law of Armed Conflict (LOAC) as originating in concepts of chivalry and reciprocity,¹ or emphasizes the nature of LOAC as balancing military necessity with humanitarian considerations,² all would accept that one of LOAC's main objectives is the prevention or mitigation of war's horrid effects on the civilian population.³ Still, the civilian population has remained the primary victim of the exigencies of war,⁴ whether as a direct result from kinetic attacks,⁵ or for the less publicized reason of depleting supplies

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¹ See, e.g., GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 3-11 (2nd ed. 2016).

² See, e.g., YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 4-5 (2nd ed. 2010).

³ LAURIE R. BLANK & GREGORY P. NOONE, *INTERNATIONAL LAW AND ARMED CONFLICT* 7 (2013).

⁴ Adam Roberts, *Lives and Statistics: Are 90% of War Victims Civilians?* 52(3) *SURVIVAL* 115 (2010).

⁵ See, e.g., Samuel Oakford, *More than 1,800 Civilians Killed Overall in Defeat of ISIS at Raqqa, Say Monitors*, *AIRWARS* (Oct. 19, 2017), <https://airwars.org/news-and-investigations/raqqa-capture/>.

necessary for its survival.⁶ It is an issue related to the latter with which this article will be concerned—that is, the LOAC rules governing and protecting consignments of humanitarian assistance delivered to the civilian population.

Although the end of the ‘Cold War’ has brought an increase in humanitarian assistance offered by third parties to the civilian population of the warring sides,⁷ it is by no means a new phenomenon in modern warfare. In fact, in 1914, Herbert C. Hoover (later the 31st President of the United States) headed a large U.S.-led operation to supply humanitarian assistance to the Belgian population under German occupation.⁸ On the other hand, the warring parties’ obligation not to refuse and obstruct offers for humanitarian assistance to the civilian population is in fact a fairly recent development. Deliberate prevention of food, medicine, and other consignments from the civilian population of the other side has not only been a common occurrence in war “since time immemorial,”⁹ but was also a permissible method of warfare until the second half of the twentieth century.¹⁰

Today, a number of substantive LOAC norms govern the belligerent parties’ response to a third party’s request to provide humanitarian assistance for the adversary’s civilian population. By excluding humanitarian assistance from the lawful means and methods of warfare available to the warring sides, these norms aspire to strengthen the general LOAC objective of preventing war’s detrimental effects on the civilian population.¹¹ In other words, assume the following scenario: State A is in an armed conflict with State B (or an armed non-state actor).

⁶ See, e.g., KLAUS VON GREBMER ET AL., 2015 GLOBAL HUNGER INDEX: ARMED CONFLICT AND THE CHALLENGE OF HUNGER (2015) <http://www.ifpri.org/publication/2015-global-hunger-index-armed-conflict-and-challenge-hunger>.

⁷ Kate Mackintosh, *The Principle of Humanitarian Action in International Humanitarian Law* 1 (HPG Report No. 5, Overseas Development Inst., 2000), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/305.pdf>.

⁸ VERNON KELLOGG, FIGHTING STARVATION IN BELGIUM 19-21 (1918).

⁹ HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 69 (1986).

¹⁰ Heike Spieker, *The Right to Give and Receive Humanitarian Assistance*, in INTERNATIONAL LAW AND HUMANITARIAN ASSISTANCE: A CROSSCUT THROUGH LEGAL ISSUES PERTAINING TO HUMANITARIANISM 7, 7-8 (Hans-Joachim Heintze & Andrej Zwitter eds., 2011). See also DINSTEIN, *supra* note 2, at 220-21.

¹¹ See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF 12 AUGUST 1949, at 179 (Jean S. Pictet ed., 1958) [hereinafter GC IV COMMENTARY]. For a detailed account of the rules, see *infra* Part II.

Party C (another State, a humanitarian organization, or any other actor) seeks to deliver humanitarian aid to the civilian population of State B, whether situated in the territory of State B or in a territory occupied by State A. Whereas in earlier times State A would have acted within its rights if it were to prevent C from delivering aid to B's civilians, State A's conduct regarding C's request is now governed by the norms of LOAC mentioned above. It is with those norms this article is concerned.

Recent scholarly attention has been given to various legal issues regarding the norms governing humanitarian assistance in LOAC, such as their relevance to Armed Non-State Actors (ANSAs)¹² and the consequences of noncompliance.¹³ As a result of the U.N. Secretary General's call to further explore the boundaries of a party's prerogative to withhold consent to the transfer of humanitarian assistance to the civilian population,¹⁴ significant research was conducted into the concept of "arbitrary withholding of consent,"¹⁵ culminating in recently published comprehensive legal guidance.¹⁶ Yet, the element of technical arrangements has received relatively little scholarly attention. Sometimes referred to as technical arrangements, or measures of control, it is commonly agreed upon that the belligerent parties hold the ability to prescribe certain arrangements regarding the provision of humanitarian assistance. This is in addition to any arrangements already in place concerning the entry of any goods to the territory in question. Arrangements aimed at securing certain interests or addressing certain considerations the belligerent might have regarding the provision of humanitarian assistance will be collectively referred to in this article as *technical arrangements*. Further exploration into the terminology will follow in Part II.D of this article. The intent of this article is to fill the academic gap surrounding those technical arrangements.

¹² Tom Gal, *Territorial Control by Armed Groups and the Regulation of Access to Humanitarian Assistance*, 50 *ISR. L. REV.* 25 (2017).

¹³ Dapo Akande & Emanuela-Chiara Gillard, *Promoting Compliance with the Rules Regulating Humanitarian Relief Operations in Armed Conflict: Some Challenges*, 50 *ISR. L. REV.* 119 (2017).

¹⁴ U.N. Secretary-General, *The Protection of Civilians in Armed Conflict: Rep. of the Secretary-General*, ¶ 58, U.N. Doc. S/2013/689 (Nov. 22, 2013).

¹⁵ Dapo Akande & Emanuela-Chiara Gillard, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict*, 92 *INT'L L. STUD.* 483 (2016).

¹⁶ Dapo Akande & Emanuela-Chiara Gillard, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (commissioned and published by the United Nations Office for the Coordination of Humanitarian Affairs 2016) [hereinafter *OXFORD GUIDANCE*] (UNOCHA) <https://www.unocha.org/sites/unocha/files/Oxford%20Guidance%20pdf.pdf>.

By carefully examining the legal framework pertaining to the issue, this article is intended to achieve two interrelated goals. First, this article will provide the reader with a detailed outline on the issues regarding the prescription of technical arrangements for humanitarian assistance in LOAC. By doing so, it will hopefully contribute to a better understanding of the term “technical arrangements” in and of itself, including the legitimate reasons for prescribing such technical arrangements. Those reasons include ensuring the humanitarian nature of the consignment; preventing interference with military operations; and protecting the consignment, the beneficiaries or others concerned—as well as the proper balancing formula between those reasons and relevant humanitarian concerns. Second, this article will demonstrate that the prescription of technical arrangements is in fact a subject of great substantive value within the humanitarian assistance general framework, vital to the understanding of the governing norms on the matter. Specifically, it will demonstrate that both theoretical and practical considerations favor the analysis of the issue of humanitarian assistance through the prism of technical arrangements. A binary concept such as consent and arbitrariness can only serve as a guiding principle in the most extreme cases, whereas applying the legal framework relative to humanitarian assistance can be better served by examining and understanding the more nuanced element of the existing legal framework. Namely, the issue of technical arrangements. Therefore, it will be demonstrated that understanding the issue of technical arrangements can assist in both theoretically understanding and practically implementing the issue of humanitarian assistance in LOAC as a whole.

In Part II, this article will review the key elements of the norms regulating humanitarian assistance in LOAC, attempting to both frame the issue of technical arrangements and point out gaps in the current legal understanding of the issue as a whole. Part III will provide a detailed examination of considerations that can be lawfully addressed by prescribing technical arrangements. Part IV analyzes the balancing act required to examine the influence of the technical arrangements on the humanitarian assistance. Finally, Part V will demonstrate the theoretical and practical benefits of examining the entirety of the issue of humanitarian assistance in armed conflict through the prescription of technical arrangements.

II. The Legal Framework Regulating Humanitarian Assistance

A. General

The rules of LOAC governing humanitarian assistance seemingly vary between three different frameworks, namely the law governing International Armed Conflict (IAC) other than belligerent occupation (referred hereto as IAC);¹⁷ Belligerent Occupation; and Non-International Armed Conflict (NIAC). All three legal classifications have distinct and specific rules governing the belligerent's response to a request to deliver humanitarian assistance to the civilian population of the other side to the conflict.

In an IAC, the belligerent party is not under a proactive obligation to satisfy the humanitarian needs of the other side's civilian population.¹⁸ Instead, under Article 23 of the Fourth Geneva Convention of 1949 (GC IV)¹⁹ the belligerent party is only obligated to allow the free transfer of two categories of consignments to the civilian population of the other side: medical supplies²⁰ and objects necessary for religious practices meant for civilians in general and food and clothing meant for expectant mothers, maternity cases, and children under the age of fifteen. Article 70 of the First Additional Protocol (AP I),²¹ accepted as reflecting customary

¹⁷ Strictly speaking, the Law of Belligerent Occupation is a specific sub-category within the rules governing international armed conflict. See YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 3 (2009). Yet for the purpose of this article we will treat it distinctly from the IAC regime governing the conduct of ongoing hostilities.

¹⁸ See, e.g., Akande & Gillard, *supra* note 15, at 487; OXFORD GUIDANCE, *supra* note 16, at 11; INTERNATIONAL COMMITTEE OF THE RED CROSS, *INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS—REPORT PREPARED FOR THE 32ND INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT* 27 (2015) (all referring to the proactive responsibility a belligerent has solely towards the civilian population under its control). See also Ariel Zemach, *What Are Israel's Legal Obligations towards the Gaza Population?*, 12 MISHPAT U'MIMSHAL 83, 108-13 (2009) (Isr.) (a Hebrew article specifically stating and demonstrating the lack of proactive obligation absent a state of belligerent occupation).

¹⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 23, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

²⁰ Regarding medical supplies, note that their transfer is protected also if it is meant for the military, owing to the special rules regarding the treatment of the sick and wounded soldiers under LOAC. See OXFORD GUIDANCE, *supra* note 16, at 23. That issue is beyond the scope of this article.

²¹ Protocol (I) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 70, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

international law by the ICRC,²² the U.S.,²³ and Israel,²⁴ has expanded the obligation to include all forms of humanitarian goods and related services²⁵ destined to the civilian population of the other side in general, while expectant mothers, maternity cases, children, and nursing mothers are only prioritized.²⁶ Note that the belligerent party is not only obligated to simply allow the transfer of humanitarian assistance to the civilian population of the other side, but also to protect it and facilitate its rapid transfer.²⁷ Some commentators argue that similar rules apply in a NIAC,²⁸ even though the text of Common Article 3 (CA 3)²⁹ and Article 18 of the Second Additional Protocol (AP II)³⁰ seems narrower.³¹

²² INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL. 1, 193-194 (Jean-Marie Henckaerts & Louise Doswald Beck eds., 2005) [hereinafter ICRC STUDY].

²³ Michael J. Matheson, Deputy Legal Adviser, Department of State, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law* (Jan. 22, 1987), 2 AM. U. J. INT'L L. & POL'Y 419, 426 (1987).

²⁴ HCJ 9132/07 Jaber al-Bassiouni Ahmad et al. v. The Prime Minister and the Minister of Defense, ¶ 14 (Jan. 30, 2008), Nevo Legal Database (By subscription, in Hebrew) (Isr.) [hereinafter Al-Bassiouni Case] (in which the Supreme Court acknowledged the customary status of article 70 API, based on the Government's position).

²⁵ Article 70(1) refers to Article 69(1), which states some specific examples as well as a general rule – all measures required for the survival of the civilian population, as well as religious objects. See AP I, *supra* note 21, art. 69-70. Related services are not specifically mentioned, but are logically inferred. See OXFORD GUIDANCE, *supra* note 16, at 8.

²⁶ AP I, *supra* note 21, art. 70(1).

²⁷ *Id.* art. 70(4).

²⁸ See Akande & Gillard, *supra* note 15, at 487; INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 18, at 26-30; Charles A. Allen, *Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law*, 19 GA. J. INT'L & COMP. L. 1, 11 (1989);

²⁹ An Article appearing in all four Geneva Conventions of 1949. See, e.g., GC IV, *supra* note 19, art. 3.

³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) art. 18(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

³¹ The *Oxford Guidance* lists some issues where there is a possible divergence between the humanitarian assistance rules in IAC and NIAC, such as the issue of the exact scope of responsibility by ANSAs in NIAC regarding the territories under their control; or the scope of obligation imposed upon non-belligerent States through which the humanitarian aid is planned to transfer. See OXFORD GUIDANCE, *supra* note 16, at 16-18, 40-41. See also Gal, *supra* note 12.

The rules regarding the transfer of humanitarian assistance are sometimes perceived as a specific application of the prohibition to cause the starvation of the civilian population,³² with starvation understood by some as relating not only to actual malnourishment but to the survival of the population in general.³³ In any case, since the rules regarding humanitarian assistance are only meant to enable the survival of the civilian population and not the continued free-flow of goods between belligerents (or any other State or Non-State Actors),³⁴ commentators have noted two qualifications to the rule allowing the passage of humanitarian assistance: preliminary conditions ensuring the humanitarian nature of the assistance delivered, and the required consent of the belligerent party concerned.³⁵ The issue of technical arrangements prescribed and implemented has been dealt with as a secondary stage, considered only after consent is granted.³⁶

The rules regarding the transfer of humanitarian assistance to the civilian population during *belligerent occupation* are seemingly different. Article 59 of GC IV stipulates that if the civilian population's basic needs are not met, "the Occupying Power shall agree to relief schemes on behalf of the population, and shall facilitate them by all means at its disposal."³⁷ The obligation to allow the delivery

³² INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 653 & 1456 (Yves Sandoz et al. eds., 1987) [hereinafter AP COMMENTARY].

³³ Knut Dörmann, *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*, 83 INT'L REV. RED CROSS 461, 475-476 (2001); Cf. Michael Cottier & Emilia Richard, *Paragraph 2(b)(xxv): Starvation of Civilians as a Method of Warfare*, in THE ROME STATUTE OF THE ICC—A COMMENTARY 508, 512 (Otto Triffterer & Kai Ambos eds., 3rd ed. 2016).

³⁴ Compare Amichai Cohen, *Economic Sanctions in IHL: Suggested Principles*, 42 Isr. L. Rev. 117, 124-126 (2009); Abraham Bell, *A Critique of the Goldstone Report and Its Treatment of International Humanitarian Law*, 104 ASIL PROCEEDINGS 79, 80-81 (2010); Anna Segall, *Economic Sanctions: Legal and Policy Constraints*, 81 INT'L REV. RED CROSS 763 (1999).

³⁵ See, e.g., Akande & Gillard, *supra* note 15, at 492-503; Akande & Gillard, *supra* note 13, at 121-122; Michael Bothe, *Relief Action*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, VOLUME IV 168, 171 (R. Bernhardt ed., 2000); INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 18, at 27; Marco Sassoli, *When Are States and Armed Groups Obligated to Accept Humanitarian Assistance?*, PROFESSIONALS IN HUMANITARIAN ASSISTANCE AND PROTECTION (Nov. 5, 2013).

³⁶ A most telling example can be found in the *Oxford Guidance*, referring to the right to prescribe technical conditions only "once consent has been granted". See OXFORD GUIDANCE, *supra* note 16, at 26.

³⁷ GC IV, *supra* note 19, art. 59.

of humanitarian assistance in the context of belligerent occupation is perceived as the mirror image of the occupier's proactive duty to ensure the civilian population's survival, articulated in Article 55, GC IV.³⁸ This, coupled with the absence of reference to the occupier's required 'consent' in the treaty text, has led prominent commentators to say that the obligation is in fact "unconditional,"³⁹ and some suggest that the occupier is actually under an obligation to actively seek the necessary humanitarian assistance.⁴⁰ Yet, it is agreed that the humanitarian nature of the assistance is still a key element,⁴¹ as it is in the rules governing humanitarian assistance in NIAC and IAC. This element will be discussed next.

B. Preliminary Conditions Defining Humanitarian Assistance

The belligerent party is under no obligation to allow the free passage of all goods and services, even if meant solely for the benefit of the civilian population. Only those goods and services that are humanitarian in nature are those governed by the LOAC rules regarding humanitarian assistance.⁴² Two elements are to be considered when deciding whether to classify a request as humanitarian assistance: a need-based purpose and impartiality.⁴³

To qualify as a *need-based purpose*, the humanitarian assistance has to offer supplies that the civilian population requires for its survival, as evident from the explicit text of the relevant provisions.⁴⁴ The need must be assessed on concrete factual evidence, not speculation and assumptions.⁴⁵ Naturally, the factual basis of what actually constitutes a need, the lack of which is threatening the survival of the population, may vary depending on the situation on the

³⁸ GC IV, *supra* note 19, art. 59. See also DINSTEIN, *supra* note 17, at 150-51.

³⁹ See DINSTEIN, *supra* note 17, at 192; GC IV COMMENTARY, *supra* note 11, at 320; OXFORD GUIDANCE, *supra* note 16, at 18.

⁴⁰ See Rebecca Barber, *Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law*, 91 INT'L REV. RED CROSS 317, 384 (2009).

⁴¹ GC IV COMMENTARY, *supra* note 11, at 321.

⁴² Spieker, *supra* note 10, at 12.

⁴³ *Id.* at 12-13. See also Akande & Gillard, *supra* note 15, at 492-93.

⁴⁴ See AP I, *supra* note 21, art. 69 (stipulating that the belligerent occupier's minimum standard requires the supply of goods "essential to the survival of the civilian population"); *id.* art. 70(1) (referring to Article 69 AP I); AP II, *supra* note 30, art. 18(2).

⁴⁵ See Spieker, *supra* note 10, at 12-13.

ground,⁴⁶ which can be affected by the intensity and length of the fighting, as well as other contextual circumstances. Similarly, the goods provided as humanitarian assistance are not limited to the specific examples listed in the relevant provisions of the treaties, as long as they are meant to satisfy the basic needs required for the civilian population's survival. However, goods and services which are not required for the survival of the population, such as materials needed for economic development and reconstruction (e.g. wood for the manufacturing of furniture, construction material required for development and reconstruction), are not considered humanitarian assistance,⁴⁷ and are therefore subject to whatever policy the belligerent party prescribes, as it is under no obligation to allow their transfer.⁴⁸ Contrary to one commentator's opinion,⁴⁹ policies prescribed in this regard cannot affect the classification of goods and somehow subject them to the rules regarding humanitarian assistance even though they are not needed for the survival of the population. For example, if the belligerent party decides to prescribe certain limitations on the transfer of raw material meant to manufacture household furniture, this decision in and of itself does not affect the determination of whether this raw material or the furniture constitute humanitarian assistance. Such a determination can only be made by examining the need for said furniture for the survival of the population. In more general terms, the humanitarian nature of the assistance is solely determined by fact-based examination concerning the needs for the survival of the civilian population.⁵⁰

⁴⁶ Cf. Cottier & Richard, *supra* note 33, at 513 (discussing changing circumstances affecting the classification of certain facilities as 'indispensable' for the survival of the population).

⁴⁷ Cf. Spieker, *supra* note 10, at 7 (explaining that the term 'humanitarian action' is wider than humanitarian assistance, and includes the issues of reconstruction and development); G.A. Res. 46/182, ¶ 9 (Dec. 19, 1991) (mentioning that humanitarian assistance is "a step towards long-term development," thus indicating that it is not in and of itself meant for development); INSTITUTE OF INTERNATIONAL LAW, RESOLUTION ON HUMANITARIAN ASSISTANCE (2003), http://www.idi-iil.org/app/uploads/2017/06/2003_bru_03_en.pdf (stating that "humanitarian assistance is only the first necessary step to rehabilitation, recovery and long-term development," thus indicating that it is not in and of itself meant for "rehabilitation, recovery and long-term development"). *Id.*

⁴⁸ See *supra* note 34 and accompanying text. See also U.K. MINISTRY OF DEFENCE, JSP 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, ¶ 9.12.3 (2004) [hereinafter UK MANUAL].

⁴⁹ See Sari Bashi, *Justifying Restrictions on Reconstructing Gaza: Military Necessity and Humanitarian Assistance*, 49 ISR. L. REV. 149, 165-66 (2016).

⁵⁰ Note that in its new commentary regarding CA 3, the ICRC has espoused a very broad definition of "humanitarian activity" but when discussing relief has reiterated the 'survival' standard, and in any case maintained that the concept might put on different forms owing to factual (rather than legal) considerations. INTERNATIONAL COMMITTEE OF

It is also pertinent to note that the need fulfilled must be that of the *civilian* population, not sustaining or contributing to military efforts.⁵¹ This means the belligerent party is under no obligation to allow the passage of goods it has “serious reasons” to suspect will be used by the fighting forces on the other side,⁵² ranging from weapons and other military equipment⁵³ to provisions of food.⁵⁴ This does not necessarily mean the belligerent party must have concrete and specific information that a particular consignment is meant for the adverse fighting forces. The belligerent party can employ various other methods meant to ensure that assistance is not supplied to the other side’s armed forces, such as limiting the quantities so that they will not exceed those required by the civilian population, which prevents the adverse party from using the surplus for its benefit;⁵⁵ or implement other measures meant to ensure the humanitarian assistance will be delivered to civilians alone.⁵⁶

THE RED CROSS, 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, ¶ 812, 813, 820 (2nd ed., 2016) [hereinafter ICRC 2016 COMMENTARY]. See also Sean Watts, *The Updated First Geneva Convention Commentary, DoD’s Law of War Manual, and a More Perfect Law of War, Part I*, JUST SECURITY (July 5, 2016), <https://www.justsecurity.org/31749/updated-geneva-convention-commentary-dods-lowm-perfect-law-war/> (mentioning some criticism regarding the extensive reliance of the new ICRC commentary on academics and other organizations rather than state practice).

⁵¹ GC IV, *supra* note 19, art. 23. See also Cedric Ryngaert, *Humanitarian Assistance and the Conundrum of Consent: A Legal perspective*, 5:2 AMSTERDAM L. F. 5, 9-10 (2013).

⁵² GC IV, *supra* note 19, art. 23. Some claim that the reference to the “serious reasons” is subjective and prone to misuse, explaining why it no longer appears in AP I (See AP COMMENTARY, *supra* note 32, at 827), but both the U.S. and the U.K. have maintained reference to this standard in their new military manuals. See U.S. DEP’T OF DEF., DOD LAW OF WAR MANUAL para. 5.19.3 (May 2016) [hereinafter LAW OF WAR MANUAL]; UK MANUAL, *supra* note 48, ¶ 9.12.1.

⁵³ Cf. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 242 (distinguishing between the provision of weapons as intervention, and the provision of humanitarian assistance which doesn’t constitute intervention). Note that in any case, delivery of military equipment is by definition not meant to supply the need of the population and therefore doesn’t qualify as humanitarian assistance to begin with.

⁵⁴ See LAW OF WAR MANUAL, *supra* note 52, para. 5.20.1. But see *supra* note 20.

⁵⁵ In 2007 Israel limited the amount of fuel entering the Gaza Strip based on the quantities needed for the civilian population, thus preventing, at least in part, the use of fuel by militants. See *Al-Bassiouni Case*, *supra* note 24, ¶ 4.

⁵⁶ See *infra* Part III. B.

As for the issue of *impartiality*, the texts of both AP I Article 70(1) and AP II Article 18(2) mention that humanitarian assistance must be “impartial” and “conducted without any adverse distinction.”⁵⁷ This means that humanitarian assistance is to be supplied and distributed based solely on consideration regarding the extent and gravity of the need, i.e. not on the basis of nationality, political considerations, and the like.⁵⁸ The concept of impartiality is recognized by the ICRC⁵⁹ and the International Court of Justice (ICJ)⁶⁰ as a core element of humanitarian assistance, and is generally considered one of the main characteristics of the broader concept of humanitarian actions.⁶¹ Yet, it is pertinent to understand that it is a “micro-level principle,” regulating the specific operation of a specific humanitarian assistance delivery.⁶² It is distinct from the wider concept of neutrality, which is at the macro-level,⁶³ and is not required when providing humanitarian assistance.⁶⁴ The third party providing humanitarian assistance, be it a humanitarian organization or another State, is not under any LOAC obligation to be politically neutral to the conflict, nor obligated not to have wider political issues motivating its efforts to assist.⁶⁵ It is merely under an obligation to provide and distribute the assistance in an impartial manner, based on the gravity of the need, for it to be considered humanitarian assistance.

In order for a consignment to be considered as humanitarian assistance it must be aimed at satisfying a need of the civilian population required for its survival and must be delivered impartially. Assistance not included in this definition is at the complete discretion

⁵⁷ AP I, *supra* note 21, art. 70(1); AP II, *supra* note 30, art. 18(2).

⁵⁸ See Spieker, *supra* note 10, at 12-13; AP COMMENTARY, *supra* note 32, at 818.

⁵⁹ ICRC STUDY, *supra* note 22, at 193-94.

⁶⁰ Nicaragua case, *supra* note 53, ¶ 242.

⁶¹ Kubo Macak, *A Matter of Principle(s): The Legal Effect of Impartiality and Neutrality on States as Humanitarian Actors*, 97 INT’L REV. RED CROSS 157, 161-162 (2016). Cf. Spieker, *supra* note 10, at 7 (explaining the distinction between humanitarian assistance and the broader term of humanitarian action).

⁶² Macak, *supra* note 61, at 161.

⁶³ *Id.* Note that the concept of neutrality is wider and different than the *Jus Ad Bellum* ‘neutrality’ which simply means the State is not a side to the conflict. See Macak, *supra* note 61, at 158.

⁶⁴ See ICRC 2016 COMMENTARY, *supra* note 50, ¶ 798.

⁶⁵ Thus, for example, the U.S. State Department views humanitarian assistance a part of its toolkit. See Captain Bertrand A. Pourteau, *Answering the Call: A Guide to Humanitarian Assistance and Disaster Relief for the Expeditionary Judge Advocate*, ARMY LAW., Oct. 2016. See also AP COMMENTARY, *supra* note 32, at 818 (“traditional links, or even the geographical situation, may prompt a State to undertake such actions, and it would be stupid to wish to force such a State to abandon the action.”).

of the belligerent side, which is free to deny its transfer to the other side's civilian population. However, even the delivery of assistance well within the definition of humanitarian assistance would sometimes require the consent of the belligerent party. This issue will be discussed next.

C. The Scope of an Obligation to Consent

As mentioned above, most commentators point out that when a belligerent party is occupying the adversary's territory, it has an "unconditional" duty to allow the passage of humanitarian assistance for the occupied civilian population.⁶⁶ On the other hand, in situations other than occupation (namely IAC and NIAC), the transfer of humanitarian assistance to the civilian population of one side to the conflict would require the consent of the belligerent party.⁶⁷ The treaties' texts fall short of clarifying the applicable legal standard for consent. Article 23, GC IV, lists some criteria for withholding consent, mainly referring to the risk of humanitarian assistance being diverted from its intended goal (which would, in any case, negate its 'humanitarian' character altogether) or assisting the enemy's war effort.⁶⁸ Article 70, AP I, does not mention criteria, leading some to say the criteria are "obsolete,"⁶⁹ yet it explicitly refers to the need to secure the belligerent party's consent prior to transferring humanitarian assistance. On the other hand, commentators note that article 70, AP I, can be read as more authoritative because it states that humanitarian assistance initiatives "shall be undertaken."⁷⁰ The only clear rule provided by AP I is that refusal cannot be based on the claim that offering humanitarian assistance constitutes an interference in the armed conflict.⁷¹

Commentators agree that the consent is not completely discretionary and cannot be withheld arbitrarily or capriciously,⁷² but

⁶⁶ See *supra* notes 39-40 and accompanying text.

⁶⁷ See, e.g., OXFORD GUIDANCE, *supra* note 16, at 16; ICRC STUDY, *supra* note 22, at 193. See also *supra* notes 14-16 and accompanying text.

⁶⁸ GC IV, *supra* note 19, art. 23. See also Ryngaert, *supra* note 51, at 9-10.

⁶⁹ AP COMMENTARY, *supra* note 32, at 828. But see *supra* note 52.

⁷⁰ *Id.* at 819. See also Bothe, *supra* note 35, at 170.

⁷¹ AP I, *supra* note 21, art. 70(1) ("Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts.").

⁷² See, e.g., OXFORD GUIDANCE, *supra* note 16, at 16; ICRC STUDY, *supra* note 22, at 193; DINSTEIN, *supra* note 2, at 227; Akande & Gillard, *supra* note 15, at 488; Bothe, *supra* note 35, at 171.

different commentators espouse different meanings to the rule. Whereas one commentator notes that “there are a host of non-arbitrary and practical reasons” a belligerent can justifiably invoke to withhold consent for humanitarian assistance,⁷³ other commentators seem to have a more absolutist view of the legal rule, claiming that if the civilian population is in need of assistance and humanitarian assistance is offered, any refusal would be arbitrary.⁷⁴ Since the need of the civilian population is actually a prerequisite for classifying assistance as humanitarian,⁷⁵ the latter proposition would actually have the effect of creating an obligation to allow the passage of humanitarian assistance absent an occupation, that is essentially unconditional as well.

Another commentator proposed that consent may be withheld if the assistance does not meet the preliminary criteria for ‘humanitarian assistance’ detailed above, or for “security reasons,”⁷⁶ whereas others claim that military necessity can never be invoked to justify such withholding of consent.⁷⁷ A commendable effort to theorize the concept of arbitrarily-withheld consent has listed different legal concepts and frameworks from which a better understanding of the belligerent party’s discretion in these decisions can be achieved,⁷⁸ including the doubtfully applicable International Human Rights Law,⁷⁹ but has stopped short of offering actual parameters of concrete decision-making (such as the relevance of military considerations).

To add more confusion to the matter, consider the question of who actually needs to grant consent. The treaties refer to the parties

⁷³ DINSTEIN, *supra* note 2, at 227.

⁷⁴ See ICRC 2016 COMMENTARY, *supra* note 50, ¶ 834; Jelena Pejic, *The Right of Food in Situations of Armed Conflict: The Legal Framework*, 83 INT’L REV. RED CROSS 1097, 1103 (2001); ICRC STUDY, *supra* note 22, at 194; Felix Schwendimann, *The legal framework of humanitarian access in armed conflict*, 93 INT’L REV. RED CROSS 993, 999 (2011).

⁷⁵ See *supra* Part II. B.

⁷⁶ Ryngaert, *supra* note 51, at 9-10.

⁷⁷ See ICRC 2016 COMMENTARY, *supra* note 50, ¶ 838; INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 18, at 29.

⁷⁸ Akande & Gillard, *supra* note 15; OXFORD GUIDANCE, *supra* note 16.

⁷⁹ See, e.g., LAW OF WAR MANUAL, *supra* note 52, paras. 1.6.3-1.6.3.4 (presenting the U.S position on the applicability of international human rights law in armed conflict); Alan Baker & Ady Schonmann, *Presenting Israel's Case Before International Human Rights Bodies*, 19 JUSTICE - THE INT’L ASS’N OF JEWISH LAW. AND JURISTS 23 (1998); Captain Brian J. Bill, *Human Rights: Time for Greater Judge Advocate Understanding*, ARMY LAW., June 2010, 58-59.

“concerned,”⁸⁰ which begs the question—when is a belligerent party actually “concerned”? Some suggest the belligerent party is “concerned” only when the consignments are actually planned to go through a territory under its control.⁸¹ However, it seems unreasonable not to allow any discretion to the belligerent side even when assistance is delivered without going through its territory, but goes through an area where its forces are operating.⁸² Practically speaking, failing to secure the consent from a military operating in a theater of hostilities might result in serious risk to the humanitarian assistance and its recipients.

Essential issues require further clarification, such as: the actual scope to withhold consent; the legitimate considerations justifying withholding consent; the actual difference between consent in the field of belligerent occupation compared with IAC and NIAC; and the belligerent party’s ability to withhold consent concerning assistance delivered to the theater of hostilities. As will be demonstrated below, the analysis of the issue of technical arrangements can provide further clarification on the issues.

D. The Authority to Prescribe Technical Arrangements within the General Framework

The rules regarding the passage of humanitarian assistance provide a myriad of measures the belligerent party can utilize to exercise control over the humanitarian assistance delivered to the civilian population of the other side to the conflict. Those measures are generally meant to address concerns the belligerent party might have regarding consignment transferred to its adversary’s territory. Regarding IACs, the treaties’ text stipulate that the belligerent party is entitled to prescribe technical arrangements; demand that the distribution of the humanitarian assistance be supervised by a third party; and exert some control over the identity and free movement of

⁸⁰ AP I, *supra* note 21, art. 70(1) (“subject to the agreement of the Parties concerned”); AP II, *supra* note 30, art. 18(2) (“subject to the consent of the High Contracting Party concerned.”).

⁸¹ See AP COMMENTARY, *supra* note 32, at 819; Bothe, *supra* note 35, at 171.

⁸² Note the fact that military forces are operating in a certain area does not, in and of itself, render the area ‘under control’ of the fighting forces. See DINSTEIN, *supra* note 17, at 38-42. As the International Criminal Tribunal for Yugoslavia put it, “battle zones may not be considered as occupied territory.” See Prosecutor v. Pelic, Case No IT-04-74-A, Judgment, ¶ 320(2) (Nov. 29, 2017).

the personnel involved.⁸³ In belligerent occupation, Article 59, GC IV, only refers to the right of other parties (i.e. not the occupying power) to prescribe technical arrangements,⁸⁴ but it would be illogical and contrary to the existing provisions of GC IV to suggest the occupying power does not possess the authority to prescribe technical arrangements and measures of control.⁸⁵ In a NIAC, the authority to prescribe specific measures of control is not specifically mentioned,⁸⁶ but the existence of that authority is assumed.⁸⁷ Therefore it would only make sense that such an authority will be assumed in a situation of belligerent occupation, where the occupying power actually holds wide legal and administrative authorities with regard to the territory under occupation.⁸⁸ It therefore follows that the belligerent party has the authority, under all three legal classifications (IAC, NIAC, and belligerent occupation), to prescribe technical arrangements, conditions for the delivery, or measures of control.

For the sake of clarity and uniformity, from here on out all different terms describing the belligerent party's ability to place conditions on the delivery of humanitarian assistance to the other side's civilian population will be referred to as "technical arrangements." However, it is necessary to understand that technical arrangements are not a collective nomenclature for any and all standard procedures and applicable legal arrangements. The laws, regulations and procedures applicable in the relevant territory apply to the consignments of humanitarian assistance and accompanying personnel, just as they apply to any other consignment or person in that territory. Naturally, a sovereign is entitled by definition to exert its authority over a territory by enacting laws and regulating activities within its territories.⁸⁹ While the mere obligation to allow the

⁸³ AP I, *supra* note 21, art. 70(3), 71; GC IV, *supra* note 19, art. 23.

⁸⁴ GC IV, *supra* note 19, art. 59.

⁸⁵ See, e.g., OXFORD GUIDANCE, *supra* note 16, at 18; Spieker, *supra* note 10, at 10; Emanuela-Chiara Gillard, *The Law Regulating Cross-Border Relief Operations*, 95 INT'L REV. RED CROSS 351, 357 (2013) (all assuming such an authority does exist in belligerent occupation).

⁸⁶ AP II, *supra* note 30, art. 18(2) (making no reference to measures of control or technical arrangements).

⁸⁷ See, e.g., ICRC STUDY, *supra* note 22, at 197; AP COMMENTARY, *supra* note 32, at 1480 (discussing the "conditions that might be imposed" in the context of a NIAC humanitarian assistance); OXFORD GUIDANCE, *supra* note 16, at 28-29 (discussing the issue of technical arrangements without distinguishing between an IAC and a NIAC).

⁸⁸ For an elaborate discussion on different authorities held by the occupying power, including legislation, security measures, and a criminal law system, see DINSTEIN, *supra* note 17, at 89-145.

⁸⁹ See MALCOLM N. SHAW, INTERNATIONAL LAW 483-487 (8th ed. 2018).

transfer of humanitarian assistance can be understood as a qualification on the sovereign's absolute discretion,⁹⁰ it does not mean all laws previously applicable to people and goods transferring through the territory suddenly cease to be relevant.⁹¹ The fact that the obligation to facilitate humanitarian assistance⁹² is understood to mandate some alleviations on entry-visas, customs requirements, or taxation of consignments⁹³ is an indication that, absent the facilitation requirement, those procedures and laws would have applied to the humanitarian assistance consignments and personnel in full.⁹⁴ Yet, despite the fact that regularly applicable laws and procedures would generally apply to humanitarian assistance, the text of the treaties still opt to mention the belligerent party's ability to prescribe technical arrangements. Had such specific wording meant only to indicate the continued application of applicable law, it would have been redundant.⁹⁵ Had it meant to encapsulate all possible applicable laws, it would have been too narrow.⁹⁶ Therefore, it seems technical

⁹⁰ See, e.g., Gal, *supra* note 12, at 37 (stating that the relevant rules reflect a balance between sovereignty and humanitarian considerations); Akande & Gillard, *supra* note 15, at 500 (noting that sovereignty cannot be used in and of its own as a reason to refuse the transfer of humanitarian assistance); AP COMMENTARY, *supra* note 32, at 819 (indicating that although the demand for a belligerent party's consent was derived from sovereignty consideration, it was nevertheless indicated by States that the sovereign's authority on the matter is not absolute).

⁹¹ Consider, for example, the speed limit applicable in a territory. Is a truck driver carrying humanitarian assistance allowed to go beyond the speed limit once consent to transfer the humanitarian assistance was granted? It seems the answer is in the negative. See Spieker, *supra* note 10, at 12.

⁹² See *supra* note 27 and accompanying text.

⁹³ OXFORD GUIDANCE, *supra* note 16, at 27; ICRC Q&A and Lexicon on Humanitarian Access, 96 INT'L REV. RED CROSS 359, 370 (2015) [hereinafter *ICRC Lexicon*]. See also U.N. Secretary-General, *Protection of and Assistance to Internally Displaced Persons: Note of the Secretary-General*, ¶91, U.N. Doc. A/65/282 (Aug. 11, 2010) (in which the secretary general calls for alleviating the taxation requirements for humanitarian assistance, as part of the obligation to allow and facilitate humanitarian assistance). Note that the issue of taxing humanitarian assistance in belligerent occupation is specifically regulated in the treaty text. See GC IV, *supra* note 19, art. 16.

⁹⁴ Note that although some of the analysis in this article might be relevant and helpful for the question of facilitating humanitarian assistance, it is a separate issue deserving of its own scholarly and practical attention which is beyond this article's scope.

⁹⁵ This is contrary to the interpretive rule stipulating that no term in a treaty should be interpreted in a way that renders it ineffective. See *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.)*, preliminary objections, 2016 I.C.J. Rep. 100, ¶41 (March 17).

⁹⁶ E.g., can the fact that the belligerent party has power to prescribe technical arrangements or determine measures of control, include its ability to tax the assistance?

arrangements are to be understood as adding another layer of authorities, beyond those regularly contained within the domestic legal regime, and applying to all goods and persons. In other words, technical arrangements are to be understood as the specific arrangements the belligerent party can prescribe regarding the humanitarian assistance meant for the civilian population of the other side to the conflict.

The rules of LOAC equip the belligerent party with specific authority to control and regulate the humanitarian assistance consignments, due to the understanding that the belligerent party might still have some legitimate concerns regarding the consignments entering the war zone.⁹⁷ Simply put, not all procedures required for the transfer of humanitarian assistance in coordination with a belligerent party are to be analyzed in accordance with the proposed analysis in this article. Those terms and conditions that are simply a manifestation of the domestic legal and administrative framework concerning the entry of goods and personnel to an area are to be examined in accordance with local law and the obligation to allow and facilitate humanitarian assistance. The subject of this article's inquiry are those terms and conditions prescribed specifically for the humanitarian assistance meant for the civilian population of the other side to a conflict. In the section that follows, this article addresses the legitimate considerations for prescribing technical arrangements.

III. Considerations for the Prescription of Technical Arrangements

A. General

As mentioned above, technical arrangements are often referred to secondary to the issues of defining 'humanitarian assistance' and the requirement for consent.⁹⁸ Consequentially, no significant systematic analysis of the possible considerations justifying the prescription of technical arrangements has been conducted. The most thorough reference to the issue of technical arrangements can be found in the recently published *Oxford Guidance on the Law Relating to Humanitarian Relief*

⁹⁷ Such as military considerations, protection of the consignment, prevention of misusing the consignments, and so on. *See infra* Part III.

⁹⁸ *See supra* note 36 and accompanying text. *See also* GC IV COMMENTARY, *supra* note 11, at 184.

Operations in Situations of Armed Conflict,⁹⁹ noting that the belligerent parties can address legitimate concerns through the prescription of technical arrangements. It goes on to specify that such technical arrangements: “may allow parties to an armed conflict to assure themselves that relief consignments are exclusively humanitarian; they may prevent humanitarian relief convoys from being endangered or from hampering military operations; and they may ensure that humanitarian relief supplies and equipment meet minimum health and safety standards.”¹⁰⁰ The guidance document goes on to list certain examples of such technical arrangements, and notes that those arrangements are to be prescribed in good faith so that they do not unjustly impede the delivery of humanitarian assistance.¹⁰¹ In identifying the legal rules governing unjust impediment, the guidance document refers to the rules regarding arbitrary withholding of consent,¹⁰² thus indicating that reasons which could be justified for refusing the transfer of humanitarian assistance can also constitute the basis for justifying the imposition of technical arrangements upon a humanitarian consignment.

This allows for an excellent starting point for this article’s analysis. Following similar logic to that demonstrated in the guidance document, this article will identify the legitimate and relevant considerations for the prescription of technical arrangements using the basic purposes listed by the guidance: verification of the humanitarian nature; military considerations; and protection considerations. Using different examples and considerations for technical arrangements, as well as legal rules derived from past works regarding the issue of consent, define the specific scope of each consideration with regard to technical arrangements will be defined.

B. Verification of the Humanitarian Nature of the Consignment

The first consideration justifying the prescription of technical arrangements is the verification of the humanitarian nature of the assistance requested for transfer to the civilian population of the other side to the armed conflict. As indicated above, in order to be

⁹⁹ OXFORD GUIDANCE, *supra* note 16, at 28-29.

¹⁰⁰ *Id.* at 28.

¹⁰¹ *Id.* at 28-29.

¹⁰² *Id.* at 29.

considered as humanitarian assistance, a consignment must be aimed at satisfying a need of the civilian population, required for its survival, and then be delivered impartially.¹⁰³ Since the belligerent party is entitled to prevent the transfer of consignments not meeting those preliminary conditions,¹⁰⁴ it would only be logical that the belligerent party have the ability to verify the humanitarian nature and prescribe technical arrangements to that end.¹⁰⁵ In fact, measures verifying the humanitarian nature of assistance are so crucial to the legal framework, that even when deciding to allow for humanitarian assistance without the consent of a State, the U.N. Security Council still maintained the ability of States to “confirm the humanitarian nature of these relief consignments.”¹⁰⁶

The purpose of verifying the humanitarian nature of the assistance offered can be examined through a number of subsets. The first subset is the verification of the goods intended for transfer, for example, by searching the consignments prior to their transfer. Commentators have noted that search can be instigated in order to detect weapons and other military equipment within the consignments,¹⁰⁷ but technical arrangements can be utilized more expansively to detect everything that is not humanitarian in nature. This can include not only foodstuffs or other products meant for the fighting forces of the other side,¹⁰⁸ but also any goods which are not humanitarian. That is, items which are not meant to sustain the civilian population’s ability to survive—even if those are meant solely for the civilian population. In other words, the belligerent party’s ability to condition humanitarian assistance upon verification of the nature of the goods included in the consignment, is to be viewed as directly linked to its right to refuse any non-humanitarian goods. Thus, the belligerent party has the authority to prescribe technical arrangements meant to locate and prevent the transfer of all consignments of goods meant for military use, as well as all goods not necessary for the survival of the civilian population. Measures to that end can include mandatory searches of designated consignments,¹⁰⁹ as well as searches at the provider’s warehouses used to store potential humanitarian aid meant to be

¹⁰³ See *supra* Part II. B.

¹⁰⁴ See *supra* notes 34, 42, 47-48, 52 and accompanying text.

¹⁰⁵ See OXFORD GUIDANCE, *supra* note 16, at 28; INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 18, at 30.

¹⁰⁶ S.C. Res. 2165, ¶ 3 (July 14, 2014).

¹⁰⁷ OXFORD GUIDANCE, *supra* note 16, at 28.

¹⁰⁸ See LAW OF WAR MANUAL, *supra* note 52, para. 5.20.1. *But see supra* note 20.

¹⁰⁹ See AP I, *supra* note 21, art. 70(3)(a); GC IV, *supra* note 19, art. 23, 59.

delivered,¹¹⁰ and preliminary verification of the humanitarian assistance schemes planned.¹¹¹ Technical arrangements, to this end, can additionally be prescribed to monitor the quantity of goods transferred, since the belligerent party has the option of limiting the quantities of goods provided. This ensures that only the quantity of goods actually needed—and therefore, actually of a humanitarian nature—will be transferred.¹¹²

A second subset of the verification of the humanitarian nature of the assistance concerns the verification of the proper distribution of the humanitarian assistance. Humanitarian assistance in fact ceases to be “humanitarian” if it is distributed to the armed forces¹¹³ or in a way that discriminates between civilians not on the basis of need.¹¹⁴ In recognition of this point, the text of the treaties provides for the discretion to condition the transfer of humanitarian assistance upon the supervision of a “protecting power.”¹¹⁵ Naturally, the same purpose that is the foundation of this specific authority—i.e. maintaining a strict check on the distribution of the humanitarian assistance and preventing it from reaching the hands of the adversary’s armed forces¹¹⁶—can justify a myriad of other technical arrangements meant for the same purpose. The belligerent party is not bound to use only a “protecting power”¹¹⁷ for the purpose of monitoring the delivery of the humanitarian assistance, but is free to utilize any third party for the matter.¹¹⁸ Additionally, other monitoring measures can be prescribed, such as a demand from the distributor to present receipts

¹¹⁰ GC IV COMMENTARY, *supra* note 11, at 183. Note that the options concerning preliminary searches as described might be circumstantially more limited, as determinations concerning the exact need are sometimes more difficult to make at an early stage.

¹¹¹ *Id.*

¹¹² See *supra* note 55 (discussing the example of the Israeli decision to limit the amounts of fuel transferred to the Gaza Strip, to those quantities actually required for the survival of the civilian population).

¹¹³ See *supra* notes 52-54 and accompanying text.

¹¹⁴ See *supra* notes 57-65 and accompanying text.

¹¹⁵ See AP I, *supra* note 21, art. 70(3)(b); GC IV, *supra* note 19, art. 23, 59.

¹¹⁶ See GC IV COMMENTARY, *supra* note 11, at 180.

¹¹⁷ For clarification on the term “protecting power” and its role within the framework of the Geneva Conventions, see GC IV, *supra* note 19, art. 9. See also DINSTEIN, *supra* note 17, at 64-66.

¹¹⁸ See GC IV COMMENTARY, *supra* note 11, at 183. See also GC IV, *supra* note 19, art. 11 (specifically mentioning the ability to allow an international organization to assume the place of the protecting power). The question of the criteria for selecting the third party, which could justify a discussion in and of itself, is beyond the scope of this article.

for the delivery of specific consignments or general reports on the matter.¹¹⁹

The belligerent party can also condition the transfer of humanitarian assistance upon excluding certain personnel or beneficiaries from the process due to them operating to transfer humanitarian assistance consignments to the armed forces of the other side (thus negating the humanitarian nature of the assistance).¹²⁰ However, it cannot prohibit any coordination or contact with the other side's fighting forces or responsible authorities. Maintaining contact with local actors, including members of terrorist organizations or illegitimate de-facto governments, is an imperative element for the successful coordination of humanitarian assistance in the modern battlefield,¹²¹ and in any case should not be viewed as recognition of the legitimacy of a side to the conflict or otherwise intervening with the conflict.¹²² This has led prominent voices within the international humanitarian community, including the U.N. Secretary General, to note that the belligerent party cannot use its authority to completely prohibit the contact between humanitarian workers and de-facto authorities on the ground.¹²³

The third subset of the verification of the humanitarian nature of the assistance concerns the verification of the existence of humanitarian need. As shown in Part II of this article, in order for assistance to be considered humanitarian, one must demonstrate that the civilian population would actually require assistance for its survival.¹²⁴ It therefore logically follows that the belligerent party can prescribe technical arrangements aimed at verifying the actual existence of the need, including relying mainly on their own inspections and monitoring of the humanitarian situation.¹²⁵ For

¹¹⁹ See GC IV COMMENTARY, *supra* note 11, at 183.

¹²⁰ See AP COMMENTARY, *supra* note 32, at 835; Gillard, *supra* note 85, at 360.

¹²¹ See THE SWISS CONFEDERATION'S FEDERAL DEPARTMENT OF FOREIGN AFFAIRS, HUMANITARIAN ACCESS IN SITUATIONS OF ARMED CONFLICT: PRACTITIONERS' MANUAL 99 (2nd ed. 2014) [Hereinafter HUMANITARIAN ACCESS MANUAL].

¹²² See AP I, *supra* note 21, art. 70(1) ("Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts.").

¹²³ See U.N. Secretary-General, *The protection of Civilians in Armed Conflict: Rep. of the Secretary-General*, ¶ 53, U.N. Doc. S/2017/414 (May 10, 2017). See also HUMANITARIAN ACCESS MANUAL, *supra* note 121, at 99; Ryngaert, *supra* note 51, at 16-17.

¹²⁴ See *supra* notes 44-46 and accompanying text.

¹²⁵ Thus, for example, Israel utilizes one of its military units, the Gaza Coordination and Liaison Administration, to monitor the civilian population's situation, including in times

example, a belligerent party can surely demand that all requests for the transfer of humanitarian assistance be submitted to a specific agency or office, if that office is best qualified to verify the existence of need. Technical arrangements can also be prescribed in order to satisfy the need to prove the humanitarian necessity of the population,¹²⁶ for example, by demanding or prescribing a process for the provision of information regarding the humanitarian situation of the population.¹²⁷ The belligerent party can also decide on a certain actor which is deemed more reliable than others and condition all or some of the humanitarian assistance upon that actor vouching for the existence of the proper need within the civilian population of the other side.¹²⁸

An interesting example can be found in the technical arrangements concluded in 2014 between U.N. agencies, Israel, and the Palestinian Authority, regarding the transfer of construction materials to the Gaza Strip, called the Gaza Reconstruction Mechanism. This mechanism allows for the entry of construction materials through Israel into the Gaza Strip, by prescribing a process in which the actual need is established by professional teams on the ground, followed by a request submitted through a joint system indicating the exact materials to be transferred at a certain consignment, and a monitoring system operated by U.N. personnel, meant to ensure the construction materials are indeed used for the purpose for which their entry was approved.¹²⁹

of conflict. See STATE OF ISRAEL, THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS 374-75 (2015) [hereinafter THE ISRAELI GAZA REPORT]. See also Al-Bassiouni Case, *supra* note 24, ¶3.

¹²⁶ See *supra* note 45 and accompanying text.

¹²⁷ Not to be confused with conditioning the transfer upon delivery of information regarding military issues, which is perceived as prohibited and will be further discussed ahead. See *infra* notes 145-149 and accompanying text.

¹²⁸ For example, Israel conditions most requests for entry of goods into the Gaza Strip upon a request submitted to the representatives of the Palestinian Authority and verified by them. This coincides with the fact that information Israel considers more reliable concerning the civilian population in the Gaza Strip is that provided by the Palestinian Authority's representatives. See JACOB TURKEL, ET. AL., THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010: REPORT, PART ONE 75-79 (2011).

¹²⁹ See *The Gaza Reconstruction Mechanism*, COORDINATION OF GOVERNMENT ACTIVITIES IN THE TERRITORIES, <http://www.cogat.mod.gov.il/en/Gaza/Pages/GRMgazasection.aspx> (last visited June 6, 2019); GRM.REPORT, <https://grm.report/#/About> (last visited June 6, 2019); *Supporting the Gaza Reconstruction Mechanism: Working Together to Rebuild After Conflict*, UNOPS, <https://www.unops.org/news-and-stories/stories/supporting-the-gaza-reconstruction-mechanism-working-together-to-rebuild-after-conflict> (last visited June 7, 2019).

Since the declared purpose of the mechanism is to allow for the reconstruction of the Gaza Strip, and by and large does not constitute humanitarian assistance,¹³⁰ this mechanism can serve as an example for a technical arrangement meant to address the requirement to demonstrate a need, inspect a consignment against a specifically approved request, and monitor the actual delivery of the consignment to its destination. In this regard, the Mechanism serves as an example for possible technical arrangements which can be prescribed for the purpose of verifying the humanitarian nature of an assistance offered.

C. Military Considerations

It seems the chief military concern regarding humanitarian assistance is its misuse by transferring weapons or other goods for the adversary's armed forces. Yet, as explained above, technical arrangements addressing this concern should be properly classified as measures aimed at ensuring the humanitarian nature of the consignment, since any assistance meant for the armed forces is by definition not "humanitarian." Are there any other military considerations which might justify the prescription of technical arrangements to consignments that are in fact of a humanitarian nature?

Many commentators suggest that the belligerent party has the ability to prescribe certain routes or timeframes for the delivery of humanitarian assistance, citing security considerations as a possible justification.¹³¹ Security considerations are also specifically referred to in the context of limiting the movement of personnel operating in the field of humanitarian assistance.¹³² Yet some commentators assert that military considerations can never be invoked to justify withholding consent to the transfer of humanitarian assistance,¹³³ which can be understood as preventing military considerations from justifying any and all limitations on the

¹³⁰ See *supra* note 47 and accompanying text. Although, some amounts of construction materials might be required for strictly humanitarian purposes in some instances of dire need. See U.N. Secretary-General, *supra* note 93, 57.

¹³¹ See, e.g., GC IV COMMENTARY, *supra* note 11, at 184, 322 (regarding both occupation and IAC); OXFORD GUIDANCE, *supra* note 16, at 28; Akande & Gillard, *supra* note 15, at 502; Sassoli, *supra* note 35; Spieker, *supra* note 10, at 14; Bothe, *supra* note 35, at 172; Gillard, *supra* note 85, at 360; ICRC Lexicon, *supra* note 93, at 364; Ryngaert, *supra* note 51, at 9.

¹³² AP I, *supra* note 21, art. 71(3).

¹³³ See *supra* note 77 and accompanying text.

transfer of humanitarian assistance.¹³⁴ The ICRC's assertion that military considerations cannot be invoked to refuse the transfer of humanitarian assistance but can be invoked to regulate it,¹³⁵ seems to encapsulate the conflicting views rather than reconcile them. It is unclear whether the difference between military considerations for refusal or regulation lies in content or quantity, and what actions would constitute regulation as opposed to refusal. Mostly, it is unclear how the same set of considerations—military considerations—can justify one form of limitation (i.e. regulating the assistance) but cannot justify another form of limitation (i.e. withholding consent altogether).

These seemingly conflicting views can be reconciled when examining the issue from the technical arrangements perspective. Since the rules regarding humanitarian assistance are not meant to debilitate the efficient use of force during armed conflict,¹³⁶ it would only make sense that the belligerent party be able to prescribe technical arrangements preventing the interruption or hampering of military operations. Thus, the belligerent party can condition the transfer of humanitarian assistance on the use of certain routes, locations, or times of delivery, so that they will not conflict with planned or ongoing operations.

One commentator has suggested that some difference exists between short-term military considerations such as limiting the route of a convoy going into an active war zone and long-term considerations such as ensuring a future potential battlefield would not have objects blocking visibility, basing her conclusion mainly on the “imperative military necessity”¹³⁷ allowing the limitation on activities of personnel engaged in humanitarian assistance.¹³⁸ Yet, even if one attempts to conclude a widespread rule based on the wording of one

¹³⁴ Since, as demonstrated above, reasons for the prescription of technical arrangements mirror those pertaining to withholding of consent. See *supra* note 102 and accompanying text.

¹³⁵ See ICRC 2016 COMMENTARY, *supra* note 50, ¶ 838-39.

¹³⁶ See Allen, *supra* note 28, at 16. See also Geoffrey Corn, *The Inevitable Benefits of Greater Clarity in Relation to Humanitarian Relief Access*, EJIL: TALK! (Dec. 16, 2016), <https://www.ejiltalk.org/the-inevitable-benefits-of-greater-clarity-in-relation-to-humanitarian-relief-access/#more-14829>.

¹³⁷ AP I, *supra* note 21, art. 71(3).

¹³⁸ Bashi, *supra* note 49, at 162. Note, that the Oxford Guidance does assert that limitations upon the freedom of movement of the humanitarian personnel can only be imposed temporarily, but does not go as far as assuming that the temporal limitation extends to all military considerations. See OXFORD GUIDANCE, *supra* note 16, at 27-29.

specific article,¹³⁹ the term “imperative” cannot be understood as completely synonymous with “urgent” or “imminent” as the commentator suggests,¹⁴⁰ and no other commentator has indicated that. Considering the aforementioned purpose not to obstruct the use of military force,¹⁴¹ coupled with the general wording of the treaties’ text emphasizing the belligerent party’s right to prevent the enemy from gaining military advantages from the humanitarian assistance,¹⁴² it seems more reasonable to assume the belligerent party actually holds significant discretion with regard to the authority to prescribe technical arrangements aimed at preventing the obstruction or hampering of military operations. In other words, preventing a humanitarian convoy from taking a route that conflicts with immediate plans for military maneuver is as important as regulating the delivery of humanitarian assistance so that the military maintains its battlefield tracking capabilities.

A different analysis ensues when technical arrangements are prescribed in order to gain a military advantage. Consider the following historical example: during the Mau-Mau Uprising against the British colonial rule of Kenya, it was reported that British military forces prescribed a simple technical arrangement for the delivery of foodstuff to the population—determining certain locations, situated within the villages, for the distribution of foodstuff, thus preventing its distribution outside of those villages. Research done on the matter speculated that the purpose of this technical arrangement was meant to lure the Mau-Mau fighters out of hiding.¹⁴³ It seems such an act would run contrary to the underlining purpose of the rules regarding humanitarian assistance, which is to keep the humanitarian assistance outside the scope of the conduct of hostilities,¹⁴⁴ and could also be perceived as perfidious due to the utilization of a protection or a right awarded to the civilian population for military purposes.¹⁴⁵

¹³⁹ Note that no other commentators attempting to make the same claim was found.

¹⁴⁰ Bashi, *supra* note 49, at 162.

¹⁴¹ See Allen, *supra* note 28, at 16. See also Geoffrey Corn, *The Inevitable Benefits of Greater Clarity in Relation to Humanitarian Relief Access*, EJIL: TALK! (Dec. 16, 2016), <https://www.ejiltalk.org/the-inevitable-benefits-of-greater-clarity-in-relation-to-humanitarian-relief-access/#more-14829>.

¹⁴² See, e.g., GC IV, *supra* note 19, art. 23 (discussing the prevention of the other side’s military advantage due to assistance provided).

¹⁴³ Andrew Thompson, *Humanitarian Principles Put to the Test: Challenges to Humanitarian Actions During Decolonization*, 97 INT’L REV. RED CROSS 45, 58-59 (2015).

¹⁴⁴ See *supra* note 11 and accompanying text.

¹⁴⁵ For a general account on the issue of perfidy, see SOLIS, *supra* note 1, at 457-462.

In this context, it is pertinent to note that an important element of the rules governing humanitarian assistance is the exclusion of objection to the transfer of humanitarian assistance on the basis of viewing it as interference with the conflict itself.¹⁴⁶ Allowing the warring sides to utilize the humanitarian assistance for their military advantage would actually negate the humanitarian (and specifically, impartial) nature of the assistance,¹⁴⁷ thus transforming the assistance from one that is protected from refusal based on interference with the conflict, into *actual interference* with the conflict. In other words, allowing the prescription of technical arrangements for the purpose of gaining military advantage would mean that the party prescribing these technical arrangements has the ability to negate the humanitarian nature of the assistance by utilizing legal authorities granted in the rules governing humanitarian assistance. Simply put, if side A prescribes technical arrangements for a humanitarian consignment, meant to secure its military advantage, then side B (controlling the territory to which the aid is meant) will be justified in refusing it on the basis of interference with the conflict, and the civilian population will be left with no protected humanitarian assistance.¹⁴⁸

Therefore, a belligerent party cannot prescribe technical arrangements aimed at providing it with a military advantage, since such a purpose would run contrary to the current rules and principles governing humanitarian assistance in LOAC, and could in some circumstances be considered perfidious. The belligerent party can, however, prescribe technical arrangements meant to prevent the hampering or obstruction of military operations, such as prescription of routes or timeframes for the transfer of humanitarian assistance, meant to distance the consignments from the theater of hostilities.

¹⁴⁶ AP I, *supra* note 21, art. 70(1) (“Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts.”).

¹⁴⁷ See Macak, *supra* note 61, at 179; ICRC *Lexicon*, *supra* note 93, at 374. See also AP COMMENTARY, *supra* note 32, at 835 (stating that humanitarian personnel, in order to maintain their status, “should not pass any foodstuffs or any other supplies to combatants.” This can be seen to include other forms of valuables transferred to the combatants, such as information).

¹⁴⁸ As a side note, it is worth mentioning that forcing the humanitarian personnel to collaborate with the military forces would also practically impair their ability to accomplish their mission, due to potential deterioration of the local population’s trust in them. See U.N. Secretary-General, *supra* note 93, ¶¶ 64-65; HUMANITARIAN ACCESS MANUAL, *supra* note 121, at 84 (discussing how the mere appearance of association with military forces impairs the trust of the civilian population).

This distinction can serve as a better and more nuanced understanding of the role of military considerations within the legal framework, compared with the seemingly contradictory assertions discussed in the beginning of this subpart.

D. Protection of the Consignment, the Beneficiaries, and Others

The belligerent party's obligation to protect the consignments is specifically mentioned in AP I¹⁴⁹ and is relevant to all forms of conflict (IAC, NIAC, and occupation) since it is a subset of the obligation to allow the entry of humanitarian assistance.¹⁵⁰ This obligation can be performed, amongst other options, by prescribing technical arrangements to the consignments such as limiting the possible routes or timeframes of delivery in order to distance the consignments from the fighting, for their own protection. Some have asserted that the belligerent party has an obligation not only to protect the consignment from the war itself, but also from the dangers of rioting, looting, or other attacks on the consignment.¹⁵¹ There are different technical arrangements that can contribute to achieving that goal, such as compelling the consignment to carry tracing devices or means of communication, or even condition the humanitarian assistance upon a military escort. Regarding the latter, note that although the military escort does not in and of itself nullify the humanitarian nature of the consignment (i.e. it does not constitute collaboration with a side of the conflict),¹⁵² technical arrangements of that sort need to be carefully prescribed, in order to avoid both the legal ramification of what might appear as forced collaboration, as well as practical ramifications concerning the agitation of distrust towards the humanitarian actors.¹⁵³ In any case, it is doubtful whether humanitarian actors can be forced to be accompanied by military personnel if they do not wish that,¹⁵⁴ though such objection can result in other more stringent technical arrangements if the belligerent party indeed believes that

¹⁴⁹ AP I, *supra* note 21, art. 70(4).

¹⁵⁰ See GC IV COMMENTARY, *supra* note 11, at 322 ("The obligation to authorize the free passage of relief consignments is accompanied by the obligation to guarantee their protection."). See also *id.* at 184; Spieker, *supra* note 10, at 15-16.

¹⁵¹ AP COMMENTARY, *supra* note 32, at 828-829.

¹⁵² See Bothe, *supra* note 35, at 174.

¹⁵³ See Geneva Graduate Institute of International Studies, *supra* note 146, at 908; U.N. Secretary-General, *supra* note 93, ¶ 65.

¹⁵⁴ Thus, the ICRC chose not to be accompanied by U.S. Military personnel in Iraq since 2003, and the U.S. forces did not force the matter. See Geneva Graduate Institute of International Studies, *supra* note 146, at 907-08.

defending the humanitarian assistance in a specific environment is essential.

It is pertinent to note that protection of the consignments is ultimately not meant to serve the consignments themselves or their providers, but rather for the civilian population meant to benefit from it.¹⁵⁵ Therefore, it logically follows that the belligerent party can prescribe technical arrangements to ensure not only the protection of the consignment itself, but also that of the beneficiaries. Note, that even though in an IAC the belligerent party has no positive obligation toward the other side's civilian population,¹⁵⁶ it might still possess the authority to exert some control over the consignments (i.e. prescribe technical arrangements) for the benefit of the population. One example can be found in the belligerent party's express authority to divert humanitarian assistance from its original destination when it is "in the interest of the civilian population concerned."¹⁵⁷ Note that the diversion must be based on genuine need-based prioritization, i.e., impartiality, otherwise the assistance loses its humanitarian nature.¹⁵⁸ Another example indicated by commentators is the possibility of setting health and safety standards for the consignments.¹⁵⁹ Naturally, when an adverse party possesses authorities meant for the benefit of the other side's civilian population, it might be suspected of 'hidden motives' when setting such health or safety standards. A possible solution can be found in the form of a 'litmus test' suggested by a prominent commentator in another context.¹⁶⁰ The test would seek to examine the authenticity of the belligerent party's intentions to protect the civilian population by comparing the health and safety standards the belligerent party is prescribing, with those applicable with regard to its own population. Thus, if a belligerent party seeks to enforce health and safety standards more cumbersome than those applied on its own population, the conditions are *prima facie* suspected of serving a purpose other than protecting the population of the other side.

¹⁵⁵ See OXFORD GUIDANCE, *supra* note 16, at 29.

¹⁵⁶ See *supra* note 18 and accompanying text.

¹⁵⁷ AP I, *supra* note 21, art. 70(3)(c).

¹⁵⁸ See Gillard, *supra* note 85, at 361. For the issue of impartiality, see *supra* notes 56-65 and accompanying text. For a similar discussion concerning the problem of prescribing technical arrangements that negate the humanitarian nature of a consignment, see *supra* notes 148-150 and accompanying text.

¹⁵⁹ Gillard, *supra* note 85, at 28-29.

¹⁶⁰ DINSTEIN, *supra* note 17, at 120-23.

Note that it is not only the potential beneficiaries of the humanitarian assistance who might have an interest the belligerent party can protect through the prescription of technical arrangements. The belligerent party has an obligation for the survival and wellbeing of those under its control, be it the civilian population in an occupied territory (other than the specific designated beneficiaries of the humanitarian assistance)¹⁶¹ or its own civilians in its own territory.¹⁶² Therefore, it logically follows that the belligerent party has the ability and authority to prescribe technical arrangements aimed at protecting other groups. This is not to be understood as trumping the scope of legitimate military considerations, since it cannot justify considerations that are otherwise prohibited.¹⁶³ Rather, the belligerent party's obligation to the wellbeing of other civilian population groups means that it can prescribe technical arrangements meant to ensure that those groups will not be adversely affected by the transfer of humanitarian assistance. For example, the belligerent party might have a legitimate interest in prescribing health and safety standards not specifically for the benefit of the beneficiaries, but for ensuring that dangerously low-quality goods will not end up in the hands of its own population.

In conclusion, the belligerent party has the ability to prescribe technical arrangements meant not only for its own military needs such as prevention of non-humanitarian goods or preventing the interruption of military operations, but also in order to protect other vital interests: the protection of the consignment itself (including relevant personnel); the protection of the interest of the beneficiaries; and the protection of other groups which the belligerent party is obligated to protect.

E. Interim Remarks

This article began by pointing out that reasons and considerations governing the prescription of technical arrangements could be generally inferred from considerations deemed legitimate for withholding consent

¹⁶¹ See *id.* at 89-94, 148-151. See also LAW OF WAR MANUAL, *supra* note 52, para. 11.1 (stating that “the Occupying Power is also bound to provide for the interests and welfare of the civilian population of the occupied territory.”).

¹⁶² See, e.g., INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 18, at 27 (stating that the belligerent party's obligation toward its own people in the context of an armed conflict is inferred from the “object and purpose” of LOAC).

¹⁶³ Cf. Allen, *supra* note 28, at 17-20.

for the transfer of humanitarian assistance altogether.¹⁶⁴ Yet by analyzing different possible considerations regarding the legitimacy of prescribing technical arrangements, this analysis has demonstrated the wider scope and nuanced nature of the considerations that can be considered legitimate for the prescription of technical arrangements. While measures meant to verify the humanitarian nature of the assistance offered are but a mirror-image of the rules governing the definition of humanitarian assistance covered by the rules of LOAC, the issue of military considerations indicates a more nuanced relation with the legitimate reasons for possible refusal. Thus bridging the gap between assertions negating the place of military necessity in the realm of humanitarian assistance and those recognizing its importance. The issue of considerations regarding the protection of civilian populations, discussed in subpart D, exposed an array of considerations relevant to the realm of technical arrangements, which might bear no direct relevance to the issue of consent or the withholding thereof.

Yet settling the possible considerations for the prescription of technical arrangements is only the first stage in gaining a meaningful insight into the issue of humanitarian assistance. The second issue, discussed in the following part, regards the limits on the prescription of technical arrangements, even if they are prescribed for arguably legitimate reasons.

IV. The Limits on the Prescription of Technical Arrangements

It is widely accepted that any refusal of a belligerent party to the transfer of humanitarian assistance to the other side's civilian population must be based on a valid reason.¹⁶⁵ It logically follows that every other limitation—short of complete refusal, such as technical arrangements prescribed, has to also be founded on a valid reason.¹⁶⁶ In the context of technical arrangements, Part III of this article lists and analyzes the possible valid reasons. Therefore, technical arrangements prescribed without any of the legitimate reasons listed in the previous part would be

¹⁶⁴ See *supra* note 102 and accompanying text.

¹⁶⁵ See, e.g., Akande & Gillard, *supra* note 15, at 490; Bothe, *supra* note 35, at 171; Gillard, *supra* note 85, at 356; OXFORD GUIDANCE, *supra* note 16, at 21. See also *supra* note 72 and accompanying text.

¹⁶⁶ See *supra* note 102 and accompanying text.

considered arbitrary and unlawful.¹⁶⁷ This analysis begs the question—can the invocation of a valid reason justify *any* technical arrangement prescribed?

Commentators have noted that technical arrangements cannot be prescribed in a manner resulting in impeding and effectively preventing the consignment of actual humanitarian assistance, and are to be prescribed in good faith,¹⁶⁸ as well as in a “necessary and proportionate” manner.¹⁶⁹ The ICRC has noted that prescribing cumbersome technical arrangements can be seen as a mere façade for the intention of a belligerent to prevent humanitarian assistance from being delivered,¹⁷⁰ and other commentators went as far as suggesting that if those cumbersome technical arrangements’ apparent result is the starvation of the civilian population, intent can be inferred for the purpose of international criminal law.¹⁷¹ It seems no existing legal sources actually provide specific guidance as to such limits on prescribing technical arrangements in the context of humanitarian assistance. Therefore, the analysis set forth in this part will attempt to suggest a way of understanding the proper balancing act to be employed when prescribing technical arrangements for humanitarian assistance.

At the basis of the analysis is the basic obligation of the belligerent party to allow the transfer of humanitarian assistance to the civilian population of the other side as rapidly as possible.¹⁷² The belligerent party’s authority to prescribe technical arrangements logically cannot render its basic obligation ineffective.¹⁷³ Therefore, it can be argued that the prescription of technical measures must be exercised subject to the general prohibition of *an abuse of rights*.¹⁷⁴ The scope of this purported

¹⁶⁷ Cf. OXFORD GUIDANCE, *supra* note 16, at 25; Akande & Gillard, *supra* note 15, at 501.

¹⁶⁸ See, e.g., OXFORD GUIDANCE, *supra* note 16, at 29; ICRC STUDY, *supra* note 22, at 197-98; AP COMMENTARY, *supra* note 32, at 824-26;

¹⁶⁹ See OXFORD GUIDANCE, *supra* note 16, at 29. See also Akande & Gillard, *supra* note 13, at 125-26. For a discussion of the difficulty with the label of ‘proportionality,’ see discussion *infra* notes 194-196 and accompanying text.

¹⁷⁰ See, e.g., ICRC LEXICON, *supra* note 93, at 360.

¹⁷¹ Cottier & Richard, *supra* note 33, at 519.

¹⁷² See generally, *supra* Part II. A.

¹⁷³ See GC IV COMMENTARY, *supra* note 11, at 184; AP COMMENTARY, *supra* note 32, at 824.

¹⁷⁴ Free Zones of Upper Savoy and the District of Gex (Fr. V. Switz.), Judgment, 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (June 7); WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ d158

general principle of law,¹⁷⁵ and the degree to which it has been transposed into international law, is a matter of disagreement.¹⁷⁶ However, Bin Cheng is seemingly correct when he writes that “wherever the law leaves a matter to the judgment of the person exercising the right, this discretion must be exercised in good faith, and the law will intervene in all cases where this discretion is abused.”¹⁷⁷ This position appears to have been reflected in the ICJ’s *Djibouti v. France* judgment, where it stated that, while the relevant treaty provision in that case provided “a State . . . with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties.”¹⁷⁸ It must be emphasized, however, that a “misuse [of a right] cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement.”¹⁷⁹ Indeed, the presumption of good faith is well-established in international law.¹⁸⁰

(Oct. 12, 1998); *Metal-Tech Ltd. v. Uzbek.*, ICSID Case No. ARB/10/3, ¶ 127 (Oct. 4, 2013). See also Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389 (2002).

¹⁷⁵ As is well known, “the general principles of law recognized by civilized nations” are a formal source of international law. See Statute of the International Court of Justice art. 38 ¶ 1(c), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933. See also *South West Africa (Eth. v. S. Afr.; Liberia v. S. Afr.)*, Second Phase, Judgment, 1966 I.C.J. 6, ¶ 88 (July 18). Cf. *North Sea Continental Shelf (Fed. Rep. Ger./Den.; Fed. Rep. Ger./Neth.)*, Judgment, 1969 I.C.J. 3, ¶ 132 (Feb. 20) (separate opinion of Judge Ammoun) (“the term ‘civilized nations’ is incompatible with the relevant provisions of the United Nations Charter, and the consequence thereof is an ill-advised limitation of the notion of the general principles of law”). *Contra* Hans Kelsen, *Collective Security under International Law*, 49 INT’L L. STUD. 1, 192 (1954) (“it is doubtful whether such principles common to the legal orders of the civilized nations exist at all, especially in view of the ideological antagonism which separates the communist from the capitalist and the autocratic from the democratic legal systems”).

¹⁷⁶ Cf. G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: General Principles and Substantive Law*, 27 BRIT. Y.B. INT’L L. 1, 12 (1950).

¹⁷⁷ BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 132-33 (1953).

¹⁷⁸ *Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.)*, Judgment, 2008 I.C.J. 177, ¶ 145 (June 4). Cf. Stephan Schill & Robyn Briese, “If the State Considers”: *Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. U.N. L. 61, 118 (2009). Note that it is perfectly possible that only certain aspects of a general principle of law found in various legal systems are part and parcel of international law. See Ori Pomson, *The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumberry*, 18 J. WORLD INVEST. & TRADE 712, 715-16 (2017).

¹⁷⁹ *German Interests in Polish Upper Silesia (Ger. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7, at 30 (May 25).

¹⁸⁰ *Lac Lanoux Arbitration (Fr./Sp.)*, 24 I.L.R. 101, 126 (Arb. Trib. 1957); *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, Judgment, 2009 I.C.J.

When may technical arrangements amount to *an abuse of rights* regarding the discretion provided to a party to an armed conflict? One such instance would be where “it is apparent that there is clearly no reasonable relationship between the stated objectives and the means used.”¹⁸¹ Indeed, this position appears to be implied in the ICJ’s dictum in the *U.S. Nationals in Morocco* case, where it recognized that custom authorities had a power of valuation, but emphasized that the “power . . . must be exercised *reasonably* and in good faith.”¹⁸²

Therefore, justifying a technical arrangement by invoking an unrelated reason is contradictory to the idea of exercising a right in good faith, in the sense of exercising a right in a manner for which it was not intended. It logically follows from the abovementioned analysis, that the proper and lawful prescription of technical arrangements requires them to be rationally aimed at addressing one (or more) of the legitimate considerations listed in Part III. Technical arrangements are meant to address legitimate concerns of the belligerent party, not to hinder the transfer of humanitarian assistance.¹⁸³

An abuse of rights may also occur where the measures taken to secure legitimate considerations of the state are excessive to what is necessary to protect such an interest.¹⁸⁴ Hence, prescribing technical arrangements of a certain form would also seemingly amount to *an abuse of rights* if less cumbersome arrangements can achieve the same objective.

Rep. 213, ¶ 150 (July 13); Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Provisional Measures, Order, 2014 I.C.J. 147, ¶ 44 (Mar. 3).

¹⁸¹ Whaling in the Antarctic (Austl. v. Jap.: N.Z. Intervening), Judgment, 2014 I.C.J. Rep. 226, 330 (Mar. 31) (dissenting opinion of Judge Abraham). Note that the Court’s opinion in that case focused not on issues relating to good faith, but rather on what may or may not reasonably constitute measures for the purposes of “scientific research.” *Id.* at 254, ¶ 67. In any event, the Court’s judgment is of less relevance for our purposes, considering that “[t]he ICJ can simply be seen as responsive to the language used by the litigants in these proceedings . . . and the parties were largely content for the Court to proceed on the basis of objective reasonableness.” See Stephen R. Tully, ‘Objective Reasonableness’ as a Standard for International Judicial Review, 6 J. INT’L DISPUTE SETTLEMENT 546, 565 (2015).

¹⁸² Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. Rep. 176, 212 (Aug. 27) (emphasis added).

¹⁸³ See generally *supra* Parts II. D. and III. A.

¹⁸⁴ Cf. Certain Questions of Mutual Assistance in Criminal Matters, *supra* note 178, at 281-82 (declaration of Judge Keith). See also Whaling in the Antarctic, *supra* note 181, at 330-31 (dissenting opinion of Judge Abraham).

Furthermore, an argument can be made that the rules concerning humanitarian assistance were formulated with an inherent balance between humanitarian considerations and imperatives of military necessity. As one commentator contended, the “discretionary provisions” in Article 70 to AP I “should not be confused with a negation of a clear obligation. On the contrary, they are essential concessions to military necessity, without which the duty to allow free passage would be out of touch with the demands of armed conflicts. . . . The result is a common-sense balancing of these conflicting interests, establishing clear but workable obligations.”¹⁸⁵

Applying this argument more concretely, the determination of a technical arrangement’s legality will be done by weighing the effect on the civilian population against the effectiveness and importance of the purpose served by the technical arrangement. If the adverse effects on the civilian population cannot be justified by the purpose served by the technical arrangement, then the technical arrangement would be unlawful. Note that said adverse effect can only be that affecting the survival of the civilian population. Any effect that is lesser than that is *a priori* not prohibited or taken into account, as it is outside the scope of protected humanitarian assistance.¹⁸⁶

Acknowledging that the rules concerning humanitarian assistance were formulated with an inherent balance between humanitarian considerations and imperatives of military necessity, when will the purpose served by the technical arrangement justify the adverse effects on the civilian population? Surprisingly, many sources fail to provide any meaningful insight on this question.¹⁸⁷ Three primary options exist. First, one could claim that any adverse effect on the civilian population (i.e. endangering their survival) automatically renders any technical arrangements unlawful. This would seemingly be the position of those speculating that withholding consent to humanitarian assistance actually

¹⁸⁵ René Provost, *Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait*, 30 COLUM. J. TRANSNAT’L L. 577, 635 (1992).

¹⁸⁶ See *supra* Part II. B.

¹⁸⁷ See, e.g., Spieker, *supra* note 10, at 16 (stating that “if the survival of the civilian population is threatened, the authorities responsible cannot withhold their consent without good grounds.” Note that this assertion is essentially tautological, since the survival of the population is a prerequisite for the assistance to be considered humanitarian, and the ‘good reasons’ are a prerequisite for the technical arrangements to be lawfully prescribed); Akande & Gillard, *supra* note 15, at 498-499 (mentioning on the one hand the three stages of the proportionality assessment, yet exemplify their applicability by demonstrating just the “first” and “second” stages).

required for the survival of the civilian population is under no circumstances justified.¹⁸⁸ Second (and alternatively), one could claim that all technical arrangements addressing a legitimate concern in a rational and least intrusive manner (i.e., those conforming to the prohibition of an abuse of rights) are legitimate and lawful even if adversely affecting the civilian population. It seems those who believe any legitimate reason can justify preventing the transfer of humanitarian assistance¹⁸⁹ would adhere to that position. Those adhering to this position could find further support in the traditional understanding that violating the prohibition to starve the civilian population requires actual intent to achieve that purpose as opposed to the starvation being the mere outcome of any limitation.¹⁹⁰ Finally, the third option is undertaking a balancing exercise similar to that of the proportionality rule, which is part of LOAC's targeting regime and only applies to "attacks."¹⁹¹ In such an exercise, the technical arrangement prescribed would not be lawful if its effects on the survival of the civilian population are excessive in relation to the military purpose underlying it. This may be the position held by the United States, based on its assertion that military action intended to starve enemy forces is subject to a proportionality rule.¹⁹²

Which of the three options is most desirable? This article asserts that the rules should be interpreted as requiring a balancing exercise of the sort stipulated by the third option—i.e. an excessiveness test—because the legal rules governing the transfer of humanitarian assistance specifically provide military commanders with the discretion to *balance* between military necessity and humanitarian considerations.¹⁹³ This does not mean, however, that "proportionality" is the correct label for such an exercise, even if the two are alike. In the context of LOAC, "proportionality" is a term of art that only exists in the specific case of attacks, and states have not established it as an overarching principle in any other context.¹⁹⁴ For this reason, the position of the United States,

¹⁸⁸ See *supra* note 74.

¹⁸⁹ See *supra* note 73 and accompanying text.

¹⁹⁰ See Allen, *supra* note 28, at 52, 62.

¹⁹¹ Article 57(2)(a)(iii) of Additional Protocol I is reflective of the requirements of customary international law in this regard. See AP I, *supra* note 21, art. 57(2)(a)(iii).

¹⁹² See LAW OF WAR MANUAL, *supra* note 52, para. 5.20.2.

¹⁹³ See also Corn, *supra* note 136.

¹⁹⁴ A possible exception in this regard is alluded to in the context of naval blockades. See *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, INT'L COMM. RED CROSS, 12 June 1994, <https://ihl-databases.icrc.org/ihl/INTRO/560?OpenDocument> (last visited Mar. 26, 2019). However, the customary status of this novel assertion is the subject of considerable

which refers to proportionality in the context of “military action intended to starve” (arguably, even beyond attacks) is not without difficulties. It is based on a previously written legal opinion addressing a completely different subject,¹⁹⁵ and, more importantly, it is not supported by meaningful state practice or *opinio juris* other than that of the United States itself.¹⁹⁶ Nevertheless, as explained above, an excessiveness test, rather than a “proportionality” test, seems to be better suited to the unique context of technical arrangements due to the specific balancing discretion that commanders are required to exercise.

In concluding this part of our analysis, we have seen that a belligerent party’s discretion in prescribing technical arrangements is not unfettered, even if these are prescribed on the basis of legitimate considerations. The prescription of technical arrangements may not be done in a manner that amounts to *an abuse of right*, in that it has to have a reasonable relationship between the stated objectives and the means used; and cannot be prescribed by the belligerent side if less cumbersome arrangements can achieve the same objective. Moreover, the specific rules governing humanitarian assistance require the belligerent sides, in exercising the discretion provided to them by law, to balance humanitarian concerns and military considerations.

disagreement because it does not appear to be based on a sufficient amount of actual state practice and *opinio juris*. The Israeli Supreme Court has also applied the proportionality principle to other contexts seemingly related to the application of LOAC (*see, e.g.*, HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel, 58(5) PD 807 (2004) (Isr.)), although it is unclear whether it was applied as an international law principle or rather is part of the Israeli constitutional legal system.

¹⁹⁵ Fred Buzhardt, *DoD General Counsel, Letter to Chairman Fulbright, Senate Committee on Foreign Relations, Apr. 5, 1971*, 10 INT’L LEGAL MATERIALS 1300 (1971) (an opinion given on the issue of using ‘Agent Orange’ against crops in Vietnam).

¹⁹⁶ For example, the British Manual contains no provisions on the matter of proportionality regarding humanitarian assistance. *See* UK MANUAL, *supra* note 48, ¶ 9.12-9.12.3. Israel has maintained that it is monitoring the humanitarian situation in the Gaza Strip to ensure it does not go below a minimal humanitarian necessity, but has never professed its opinion with regards to a situation where limitations would actually endanger the survival of the civilian population. *See* TURKEL, *supra* note 128, at 98-99; Al-Bassiouni Case, *supra* note 24, ¶ 3; THE ISRAELI GAZA REPORT, *supra* note 125, at 374-75.

V. The Practical and Theoretical Importance of Technical Arrangements

Unlike the academic attention given to the subject of humanitarian assistance, focused mainly on the binary concept of granting or withholding consent,¹⁹⁷ practitioners such as U.N. bodies or humanitarian activists have given somewhat more attention to the issue of measures imposed on an otherwise approved humanitarian consignment, i.e. technical arrangements. For example, belligerent parties are often criticized by practitioners, not for outright denial of consent for humanitarian assistance, but rather for cumbersome technical arrangements (and other constraints) limiting the ability to supply humanitarian assistance or rendering it ineffective altogether.¹⁹⁸ Recently, the U.N. Secretary General has indicated that ‘bureaucratic impediments’ are being used to effectively prevent humanitarian assistance from reaching the civilian population, in lieu of clear denial of consent.¹⁹⁹ When dealing with the conflict in Syria, the U.N. Security Council has criticized the sides to the conflict for “the persistence of conditions” hampering the delivery of humanitarian assistance,²⁰⁰ and went on to directly deal with what seems like technical arrangements—namely, determining the specific border-crossings humanitarian assistance can be delivered through.²⁰¹

Some practitioners have noted the importance of finding the middle-ground by constructing measures concerning control of access and delivery of humanitarian assistance, meant to satisfy some concerns the belligerent party might have while still allowing the transfer of humanitarian assistance.²⁰² Similarly, practical guidance documents meant for humanitarians operating on the ground include significantly detailed matrices aimed at providing guidance for dealing with possible conditions imposed upon the transfer of humanitarian assistance. One

¹⁹⁷ See *supra* notes 11-16 and accompanying text. See also *supra* Part II. B.

¹⁹⁸ See, e.g., OXFORD GUIDANCE, *supra* note 16, at 2; Barber, *supra* note 40, at 377-81.

¹⁹⁹ U.N. Secretary-General, *supra* note 123, ¶ 47.

²⁰⁰ S.C. Res. 2165, Preamble (July 14, 2014) (“*Deeply disturbed* by the continued, arbitrary and unjustified withholding of consent to relief operations and the persistence of conditions that impede the delivery of humanitarian supplies to destinations within Syria.”).

²⁰¹ *Id.* at ¶ 2.

²⁰² See Peter Maurer, *Humanitarian Diplomacy and Principled Humanitarian Action*, 97 INT’L REV. RED CROSS 445, 449 (2016); Soledad Herrero, *Negotiating Humanitarian Access: Between a Rock and a Hard Place*, PHAP 5-8 (Feb. 11, 2014), <https://phap.org/articles/negotiating-humanitarian-access-between-rock-and-hard-place>.

example can be seen in the *Practitioners' Manual* published by the Swiss Government discussing potential compromises regarding measures of control imposed by belligerents, and attempts to provide guidance as to dealing with possible contradictions in humanitarian principles.²⁰³ United Nations Office for the Coordination of Humanitarian Affairs, a leading U.N. agency dealing with humanitarian assistance, has published a document meant to assist in identifying and evaluating, amongst others, measures of control and technical arrangements imposed by the belligerents on humanitarian assistance operations.²⁰⁴ Similarly, the Centre for Humanitarian Dialogue has published a practical handbook for humanitarian negotiations, in which it demonstrates how understanding the belligerent party's interest can assist in achieving an agreement which includes some technical arrangements while still achieving the desired humanitarian outcome.²⁰⁵

Practitioners' increased attention to the issue of technical arrangements can be quite simply explained. In practice, the field of humanitarian assistance to the civilian population is one of negotiations, rather than invocation of clear-cut legal rules indicating a single lawful outcome.²⁰⁶ From the humanitarian organizations' perspective, reaching the intended result of delivering the humanitarian assistance to those in need might require an active engagement with the armed forces aimed at alleviating some legitimate concerns those forces might have, thus removing objections and obstacles which could otherwise prevent the safe delivery of humanitarian assistance altogether.²⁰⁷ From the belligerent parties' perspective, there could be serious benefits from the delivery of humanitarian assistance to the other side's civilian population, whether it is due to genuine concern for innocent lives, because of a strategic desire to decrease possible hostility within the civilian population, or possibly reduce objections and criticism toward the

²⁰³ HUMANITARIAN ACCESS MANUAL, *supra* note 121, at 12-13, 20, 24, 65-76, 88-109.

²⁰⁴ OCHA Access Monitoring & Reporting Framework, HUMANITARIANRESPONSE.INFO, https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/OCHA_Access_Monitoring_and_Reporting_Framework_OCHA_revised_May2012.pdf (last visited June 6, 2019).

²⁰⁵ DEBORAH MANCINI-GRIFFOLI & ANDRE PICOT, HUMANITARIAN NEGOTIATION: A HANDBOOK FOR SECURING ACCESS, ASSISTANCE AND PROTECTION FOR CIVILIANS IN ARMED CONFLICT 61-68 (2004). *See also id.* at 23-28.

²⁰⁶ *See* Akande & Gillard, *supra* note 13, at 132-133; Gillard, *supra* note 85, at 354; Herrero, *supra* note 202, at 1.

²⁰⁷ *See* AP COMMENTARY, *supra* note 32, at 1480.

actual fighting.²⁰⁸ Yet the belligerent parties will not necessarily agree to relinquish their crucial military interests for that purpose. Therefore, it is to be expected that practitioners actually needing to engage in negotiating the delivery of humanitarian assistance during armed conflict will grant more attention to the issue of technical arrangements, since it is a tool capable of a more nuanced approach to the issue of humanitarian assistance.

Assume the following simple scenario: a humanitarian organization wants to transfer a certain humanitarian consignment through a route which interferes with a belligerent party's maneuvering plans. In a theoretical world with no technical arrangements, both sides are faced with an impossible choice—either allow the humanitarian consignment to pass, thus potentially hampering the military operations; or deny the humanitarian consignment's transfer, thus preventing it from reaching the suffering civilian population. The same logic would apply to seemingly more complex examples. Assume a consignment of foodstuff is meant to be delivered to the starving civilian population, yet the belligerent party suspects some of it is actually meant for the other belligerents rather than their civilian population. One scholar suggested such a consignment should still be viewed as humanitarian even though part of it is meant for military use.²⁰⁹ Such a position would adversely affect the belligerent's ability to starve the members of the other side's armed forces, which is a legitimate military tactic under contemporary LOAC rules.²¹⁰ The *DoD Manual* suggests that the belligerent side apply a proportionality test in order to make the determination concerning the 'mixed' consignment.²¹¹ Another scholar has suggested there is no bright-line rule on the matter.²¹²

Though not necessarily capable of completely solving the problem, technical arrangements can be prescribed in such a situation in order to attempt a better solution encompassing consideration for both the

²⁰⁸ See Herrero, *supra* note 202, at 3; JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 8 (June 2015); JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 105 (2007).

²⁰⁹ Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 NAVAL WAR C. REV. 77, 81 (2000).

²¹⁰ Whereas intentionally starving the civilian population is prohibited, no such limitation exist vis-à-vis combatants. See LAW OF WAR MANUAL, *supra* note 52, para. 5.20.1; AP I, *supra* note 21, art. 54(3). See also *supra* note 51-54 and accompanying text.

²¹¹ LAW OF WAR MANUAL, *supra* note 52, para. 5.20.2.

²¹² Ryngaert, *supra* note 51, at 9-10.

population's legitimate need and the belligerent party's legitimate interest in preventing foodstuff from the other side's fighting forces. For example, the belligerent party could prescribe conditions aimed at monitoring the actual destination of the food, or impose searches meant to ensure only the quantities required for the civilian population are actually transferred. Depending on the specific facts at hand, such technical arrangements may have potential in addressing the belligerent party's concerns, thus allowing the entry of foodstuff for the other side's civilians while preventing it from being used for non-humanitarian purposes.

Technical arrangements are, therefore, a tool through which a more nuanced solution to practical problems concerning humanitarian assistance can be achieved. Before invoking a certain concern or interest supposedly justifying complete denial of humanitarian assistance, a belligerent party is logically and practically required to examine its ability to address those concerns with prescribed technical arrangements, thus possibly finding the "golden trail"—allowing the humanitarian assistance to pass through while properly addressing other concerns. Understanding the legal issues pertaining to technical arrangements can assist in finding that "golden trail," and in that sense provide better legal guidance in applying the rules of humanitarian assistance supplementing the lack of practical guidance in the black letter rules.²¹³

This practical understanding coincides with a basic legal concept previously discussed—if the same legitimate concern can be addressed by a less drastic measure, the more drastic measure can be considered unlawful.²¹⁴ In the context of humanitarian assistance, a belligerent party might have legitimate considerations and concerns regarding a certain request for the delivery of humanitarian assistance, but if those can be addressed by technical arrangements prescribed for the delivery, the belligerent party cannot invoke those concerns as a reason for withholding consent.²¹⁵ On the other hand, if those delivering the humanitarian consignment refuse to accept properly prescribed technical arrangements, this can be invoked to justify a

²¹³ See Guy B. Roberts, *The New Rules of Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 150-55 (1985) (criticizing the lack of guidance in article 70 AP I for commanders operating in the field).

²¹⁴ See *supra* notes 184-186 and accompanying text.

²¹⁵ See OXFORD GUIDANCE, *supra* note 16, at 24; GC IV COMMENTARY, *supra* note 11, at 182.

refusal to allow the transfer of humanitarian assistance. In other words, more compatible with previous academic research on the subject, withholding consent due to a concern which can otherwise be addressed by prescribing technical arrangements will be regarded as arbitrary and therefore unlawful withholding of consent. Conversely, withholding consent due to a refusal to abide by the properly prescribed technical arrangements, by any of the interested parties, cannot be considered arbitrary or unlawful.

It therefore follows that the issue of technical arrangements assist in clarifying the concept of arbitrary withholding of consent which has been an epicenter of disagreement.²¹⁶ It is clear, on the one hand, that not all seemingly legitimate concerns can automatically justify outright refusal of consent,²¹⁷ since some might be fully addressed by technical arrangements and therefore cannot justify complete withholding without first prescribing technical arrangements. On the other hand, it is clear that reasons for (non-arbitrary) withholding of consent can be invoked even if the civilian population is indeed in dire need,²¹⁸ since it is obviously legitimate to withhold consent if the other actors refuses to follow the technical arrangements legitimately prescribed in accordance with the framework set forth in this article. Similarly, since technical arrangements can be prescribed for humanitarian assistance delivered to the population of an occupied territory,²¹⁹ understanding the legal framework governing technical arrangements can assist in understanding the occupier's actual prerogatives concerning the delivery of humanitarian assistance. If an occupying power has the ability to prescribe technical arrangements, followed—as stipulated above—by the right to withhold consent if the technical arrangements are not followed, then the assertion that the occupier's obligation is 'unconditional'²²⁰ seems unfounded. In other words, the occupier's position is theoretically not different than that of a belligerent party in an IAC or a NIAC. A belligerent party in each of those frameworks is similarly allowed to address certain concerns using technical arrangements, and is therefore justified in refusing consent if the deliverers of the humanitarian assistance refuse to abide by their lawfully prescribed conditions.²²¹

²¹⁶ See *supra* Part II. C.

²¹⁷ Cf. *supra* note 73 and accompanying text.

²¹⁸ Cf. *supra* note 74 and accompanying text.

²¹⁹ See *supra* notes 84-88 and accompanying text.

²²⁰ Cf. *supra* notes 39-40 and accompanying text.

²²¹ Note that unlike the belligerent parties in an IAC or a NIAC, the occupying power is actually obligated to find other ways of supplying the population in need if it refuses to

The nuanced nature of technical arrangements can also serve to better understand and resolve other conundrums in the realm of humanitarian assistance. The interplay between military necessity and humanitarian assistance, which initially seems a point of disagreement between scholars, can be better understood when examined through the prism of technical arrangements. As shown above,²²² military necessity cannot justify arrangements aimed at gaining an advantage, but can justify certain qualifications aimed at preventing the hampering of military operations. Given this conclusion, combined with the notion that consent can be withheld when technical arrangements are not followed, it seems both the statements asserting that military necessity is irrelevant to the issue of consent, as well as those elevating it to a principle justifying refusals for consent altogether, are similarly inaccurate.

The legal balancing standard between possibly conflicting humanitarian concerns and the belligerent party's concern is also better understood when examined through the technical arrangements prism. As has been demonstrated above,²²³ the use of a legal tool allowing a variety of means to deal with certain concerns (i.e., technical arrangements), allows for a better understanding of the application of a proportionality and necessity based balancing act, in a way that allows the understanding of proportionality not simply as a binary "go/no-go" concept, but as a more nuanced guidance requiring the consideration of the rational relationship. The relationship is between the means (i.e. the technical arrangements) and the ends (i.e. the legitimate considerations) as well as selecting the least intrusive measure to achieve that end. Trying to apply the more subtle balancing act proposed in this article to the binary concept of arbitrary withholding of consent seems less effective, since when faced with a binary option (refuse or allow the passing of the consignment), one cannot practically consider a less intrusive measure of securing her legitimate interests.

grant consent to humanitarian assistance, due to its obligations toward the population as an occupier. See DIETER FLECK, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 270 (2nd ed. 2009). This legal obligation, which is undeniable, might have been the cause of some commentators viewing the issue of humanitarian assistance in occupation as different from that in other kinds of armed conflicts.

²²² See *supra* Part III. C.

²²³ See *supra* Part IV.

Furthermore, the idea that the belligerent parties concerned might also include belligerent parties which are not effectively controlling an area through which the humanitarian assistance is meant to transfer²²⁴ seems less controversial when considering the nuanced framework of technical arrangements. On the one hand, it is clear that a belligerent party conducting military operations in a certain territory might have legitimate concerns which should be addressed with technical arrangements, such as prescribing an alternate route to avoid the obstruction of military operations, or preventing non-humanitarian goods from arriving to the other belligerent party. On the other hand, some issues might be less of a concern for a belligerent party if the said consignment is not meant to pass through its territory. If defining that belligerent party as “concerned” is understood primarily as allowing it to prescribe technical arrangements, which are more nuanced than the binary concept of consent, it seems easier to accept that this concerned party might also be the party conducting operations in a theater, not only the party through which a consignment is meant to transfer.

Finally, it is pertinent to note that the proper location of the technical arrangements within both the practical and the theoretical analysis of the issue of humanitarian assistance is different than the location traditionally assigned.²²⁵ The prescription of technical arrangements has the practical ability of finding the “golden trail” mentioned above, thus rendering the absolute denial of humanitarian assistance irrelevant in some cases. It also has the ability to further the debate in concrete situations regarding the arbitrariness of decisions to deny consent. It therefore logically follows that the process of considering and prescribing technical arrangements as detailed in this article must *precede* the considerations regarding the consent. In other words, a belligerent party receiving a request for the delivery of humanitarian assistance to the civilian population of the other side to the conflict, after determining that the assistance is indeed humanitarian,²²⁶ is required to consider the issue of technical arrangements *before* addressing the issue of granting or denying consent. It is practically beneficial since it can nullify the need to deal with possible denial, as well as theoretically correct since the proper prescription of technical arrangements is crucial to analyzing the question of consent.

²²⁴ See *supra* notes 80-82 and accompanying text.

²²⁵ See *supra* note 36 and accompanying text.

²²⁶ See *supra* Part II. B.

VI. Conclusion

This article set out to achieve two interrelated goals. First, this article has systematically analyzed the issue of a belligerent party's ability to prescribe technical arrangements for the transfer of humanitarian assistance to the other side's civilian population, during armed conflict. Next, Part II has outlined the general legal framework applicable to the delivery of humanitarian assistance in LOAC, noting the preliminary conditions defining "humanitarian assistance"—assistance that is aimed at providing those goods and services needed for the survival of the population, delivered in an impartial manner. This article then examined the current discussion regarding a belligerent side's discretion to withhold consent to such assistance, demonstrating both the agreed concepts (i.e. that consent cannot be withheld arbitrarily) and the standing disagreements (i.e. what constitutes an arbitrary withholding of consent). The final subpart outlined the basic legal framework of the issue of technical arrangements, as preparation for the more detailed analysis that followed. Part III was dedicated to mapping the legitimate considerations a belligerent can invoke to justify different technical arrangements prescribed—verifying the humanitarian nature of the assistance; the place of military considerations or "military necessity"; and the protection of the consignments, the intended beneficiaries of the assistance or other relevant actors. Part IV explained the standard for examining the validity of technical arrangements prescribed in accordance with legitimate considerations, by balancing them against the humanitarian consideration foundational to the issue of humanitarian assistance. It was first emphasized that the belligerent party's authority to prescribe technical arrangements must be rationally connected to the legitimate purpose they seek to achieve, as well as not exceeding what is required to attain that particular purpose. This part concluded with a discussion about the applicability of the strict-sense proportionality principle (i.e. balancing the effect on the civilian population with the benefit the belligerent party incurs from an otherwise properly prescribed technical arrangement) to the issue of technical arrangements. Thus, Parts II-IV lay down a detailed account of the legal issues pertaining to the prescription of technical arrangements, hoping to provide some previously lacking legal guidance on the matter.

Second, by utilizing the detailed account of the legal issues pertaining to the prescription of technical arrangements, this analysis

has demonstrated that examining the issues regarding humanitarian assistance in LOAC through the prism of technical arrangements can contribute to a better understanding of the issue of humanitarian assistance as a whole. Thus, Part V was not only dedicated to show the practical importance of a more substantive legal account of technical arrangements, but also sought to emphasize how such an account assists in solving or narrowing down some standing theoretical issues. By referring to previous analyses made in this article, Part V demonstrated how technical arrangements allow a more nuanced approach to issues relating to humanitarian assistance, thus allowing a better understanding of legal issues, such as the place of military necessity; the proper balancing standard between competing humanitarian and other interests; the definition of the parties “concerned” who have the authority to prescribe technical arrangements; and, most importantly, the issue of arbitrary withholding of consent.

As has been demonstrated throughout this article, both practical and theoretical considerations favor the analysis of the issue of humanitarian assistance through the prism of technical arrangements. Similar to an observation made in a different LOAC context,²²⁷ a binary concept such as the issue of consent and arbitrariness can only serve as a guiding principle in the most extreme cases where, for example, a consignment is clearly not humanitarian or the belligerent clearly has no legitimate concern other than starving the population. Yet, reality is significantly more nuanced; therefore, applying the legal framework relative to humanitarian assistance can be better served by examining and understanding the more nuanced element of the existing legal framework—namely, the issue of technical arrangements. Understanding the issue of technical arrangements can assist in both practically implementing and theoretically understanding the issue of humanitarian assistance in LOAC as a whole. Those “technicalities” are, in other words, an issue of great substantive importance.

²²⁷ See Geoffrey S. Corn, *War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure*, 42 PEPP. L. REV. 419, 422-25, 465-66 (2014).