



# ARCS

**AMERICAN RELIEF  
COALITION FOR SYRIA**  
TOGETHER FOR RESILIENT & HEALTHY COMMUNITIES

# NEEDS NOT VETOES

# 2014 IS NOT 2022: WHY THE CONTINUATION OF UN-COORDINATED CROSS-BORDER AID INTO SYRIA ABSENT A UN SECURITY COUNCIL RESOLUTION IS LAWFUL

An ARCS Product drafted by Guernica 37 Chambers



## About the American Relief Coalition for Syria

The American Relief Coalition for Syria (ARCS) is a secular, non-political coalition of eleven Syrian diaspora led humanitarian organizations that provide multi-sector relief inside of Syria, as well as assistance and services to Syrian refugees in regional host countries and in the United States. Together the efforts of ARCS organizations help millions of Syrians, both those who remain in Syria and those displaced as refugees.

The mission of ARCS is to be a voice for US-based Syrian diaspora organizations who are providing humanitarian and development services for Syrians worldwide, through advocacy and empowering local humanitarian actors. ARCS is dedicated to building a model network of diaspora organizations in the United States that will be an impetus for positive change, social welfare and development in their homeland. Guided by its values of humanitarianism, advocacy and collaboration, ARCS and its member organizations shall pursue this mission with compassion, transparency, and generosity.

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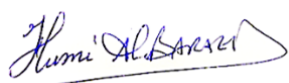
## Prologue

Since 2014, the United Nations Security Council (UNSC) vote on the renewal of cross-border humanitarian access in Syria has been a key point of annual and, beginning in 2020, biannual advocacy for Syrian and international humanitarian organizations. A high level of resources, time, and capacity have all been exercised into developing well-rounded advocacy strategies that clearly display to the international community the necessity of this essential humanitarian lifeline to the 4.1 million vulnerable Syrian civilians in the north and northwest amid the ineffectiveness of humanitarian cross-line aid. These advocacy strategies have included well-known and indisputable facts recognized by UN agencies and the international community on the dire humanitarian situation; and even as such, what started as four humanitarian cross-points have now been reduced to only one. While welcomed in 2014 during a time where the Syrian conflict was fragmented and fast-paced, it has become clear that now in 2022, inviting the UNSC's involvement has politicized lifesaving and preserving humanitarian aid.

Therefore, in 2021, as an outcome of unrelenting advocacy producing limited results, the knowledge that the Syrian humanitarian community has gained over the last decade, and with the backing of numerous Syrian humanitarian organizations, the American Relief Coalition for Syria (ARCS) sought to explore if a UNSC mandate is in fact requisite to conduct cross-border humanitarian assistance into Syria. Through this exploration, ARCS was introduced to Guernica 37 Chambers, a boutique international specialist law firm based in London. In partnership, a first of its kind legal analysis was commissioned by ARCS and drafted by Guernica 37 Chambers. The goal has been to explore and present legal arguments meant to resolve the perpetual politicization of humanitarian aid and in turn provide a stable lifeline that allows for strategic planning, increased capacity, and efficient utilization of resources.

Thus, by examining the current context of the Syrian conflict and the operational framework of the UN, this analysis brings together some of the most well-accepted legal bases for the continuation of UN-coordinated cross-border humanitarian assistance in Syria that demonstrates that the current mechanism is just one basis upon which States and UN Agencies may conduct cross-border aid. Reviewed by prominent scholars and legal experts in international law, ARCS is confident that this analysis brings forth high yielding and legally sound arguments upon which States and UN agencies may continue to provide the essential cross-border humanitarian assistance for the 4.1 million vulnerable civilians in need in Northwest Syria.

Husni Al-Barazi



*ARCS Chairman*

## Executive Summary

In 2014, UN Security Council Resolution 2165 created and concretised a framework under which humanitarian actors could deliver cross-border humanitarian assistance to areas outside of the control of the Syrian Government without the consent of any party to the conflict.

At a time when (in contrast to the present facts) the fractured and fast-moving nature of the Syrian conflict precluded reliable humanitarian negotiations with parties in effective control of Syrian territory, Security Council involvement was an understandable (albeit unprecedented, and, in the [views of high-profile scholars and practitioners](#), legally unnecessary) step to provide a consensus-based, reliable mandate for the delivery of aid to millions in north and north-west Syria.

However, by examining the nature of the Syrian conflict today and the *minutiae* of the operational aspects of the UN-coordinated cross-border humanitarian assistance framework in Syria, The American Relief Coalition for Syria (ARCS) analyses, drafted by international lawyers at Guernica 37 Chambers (G37), demonstrate that whilst the Security Council mandate may have given a clearer legal basis for doing so in 2014, it is now, in 2022, just one basis upon which States and UN Agencies may continue to provide cross-border humanitarian assistance into Syria.

The legal bases advanced in ARCS' analyses collate, rather than create, elementary and readily applicable provisions of (customary-) international law and apply them to the Syrian conflict. In doing so, they arrive at conclusions which fully respect Syrian sovereignty and territorial integrity and are supported by the conclusions of some of the highest profile scholars and practitioners in the area. Those bases include that:

- a. **cross-border humanitarian assistance is lawful for States and UN Agencies under treaty provisions governing the Syrian conflict**, which, in addition to representing customary international law, Syria has ratified in its sovereign power, and which allow for the possibility of impartial humanitarian assistance being offered to *all* conflict parties, including those outside of the Syrian Government;
- b. **cross-border humanitarian assistance is lawful for States and UN Agencies under Public International Law more generally**, as the International Court of Justice (the UN's principal legal organ) has confirmed that truly impartial cross-border humanitarian assistance can never breach the principles of sovereignty and territorial integrity;

- c. **even if cross-border humanitarian assistance is *prima facie* unlawful, it remains justified for States and UN Agencies under Circumstances Precluding Wrongfulness;**  
and
- d. **in all cases, NGOs can continue to provide cross-border humanitarian assistance under relevant rules of Public International Law, and States and UN Agencies may provide indirect assistance to them in order to do so.**

The continuation of UN-coordinated cross-border humanitarian assistance in Syria is thus not a legal issue, but a political one; whilst arguments based in law are unlikely to be used in Court, the law stands by as an instrument rather than an obstacle for those willing to use it to advocate for legally sound, humanitarian solutions that prioritise people over politics, and ultimately serve to protect the lives of the millions of Syrians that continue to show resilience in times of unprecedented hardship and uncertainty.

It is stressed that nothing in ARCS' analyses, or in those that will follow, is intended as a comment upon the legality of cross-border humanitarian assistance more generally, or an analysis of how relevant legal provisions may be interpreted or applied in other situations presenting similar issues; nor is it intended as a comment upon the (legal) propriety of past position(s) that may have previously been taken by relevant actors, including, the United Nations, in relation to cross-border humanitarian assistance in Syria. Instead, the examination is intended as a legal analysis of a selection of the most relevant legal provisions as they apply in Syria, and only in Syria, today.

States, NGOs and UN Agencies can legally and logistically deliver aid into Syria; the lives of 4.1M people depend on it.

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## I. INTRODUCTION

1. This document has been commissioned by the American Relief Coalition for Syria (“ARCS”), a secular, non-political coalition of Syrian diaspora-led humanitarian organisations that provide multi-sector relief inside of Syria, as well as assistance and services to Syrian refugees in regional host countries and the United States.
2. The analysis herein compiles **some of the most well-accepted legal bases** for the **continuation of UN-Coordinated Cross-Border Humanitarian Assistance (“XBHA”) in Syria in the absence of the present United Nations Security Council (“UNSC”) mandate**, and applies them to the Syrian conflict (and only the Syrian conflict) as it stands today.
3. Following an in-depth examination of the fresh facts of the Syrian conflict and the life-saving operational aspects of the XBHA framework in Syria, the simple focus of this document is to stress that **whilst the UNSC mandate may have given a clearer legal basis for doing so in the fractured and fast-moving Syrian conflict in 2014, it is now, in 2022, just one legal basis upon which UN Agencies may continue to provide XBHA in Syria.**
4. The intensive collation and analysis of these legal bases (which include positions taken by some of the most high-profile scholars and practitioners in the area<sup>1</sup>) was conducted by a group of expert practitioners over a period of several months, and resulted in the consideration, collation and promulgation of numerous potential legal avenues to justify, and in some respects, demand, the continuation of UN-Coordinated XBHA in Syria, even without a UNSC mandate.

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<sup>1</sup> See, e.g., Dapo Akande and Emanuela-Chiara Gillard, [‘Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict’](#) (2016) (“Akande and Gillard 2016”).

5. Those taken forward have been intentionally limited to those involving the application (rather than development) of settled (and in some cases, customary) international legal rules governing the issue of XBHA **in the context of the Syrian conflict**. They are advanced as **a smaller part of a broader** set of legal avenues by which to continue XBHA in Syria that have been identified as part of an ongoing and much wider strategic advocacy project commissioned, financed, and coordinated by ARCS since 2021, in a strategic collaboration with Members of Guernica 37 Chambers (“G37”), a boutique London-based law firm specialised in international law.<sup>2</sup>
6. This document represents just one part of ARCS’ and G37’s cross cutting engagement on this vital issue; as the project continues, they hope, through coordinated engagement with relevant stakeholders and further in-depth legal analyses, to resolve purported issues of law that are too often misrepresented as insurmountable barriers to the continuation of Syrian XBHA in the absence of the present UNSC mandate.
7. In doing so, ARCS and G37 wish to encourage the prioritisation of people focused, solutions-based legal realism over what are, in reality, political issues that needlessly endanger the lives of millions who continue to rely upon the irreplaceable lifeline provided by XBHA in the north-west of Syria and beyond.
8. **Nothing in this document, or in those that will follow, is intended as a comment upon the legality of XBHA more generally**, or an analysis of how relevant legal provisions may be interpreted or applied in other situations presenting similar issues; nor is it intended as a comment upon the (legal-) propriety of past position(s) that may have previously been taken by relevant actors, including the United Nations (“UN”),

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<sup>2</sup> This document was authored by [Jack Sproson](#) and [Ibrahim Olabi](#), both of whom are Members of [Guernica 37 Chambers](#).



in relation to XBHA in Syria. **Instead, the examination herein is conducted by legal experts on the instructions of Syrians, for Syrians, as a legal analysis of a selection of the relevant legal provisions as they apply in Syria, and only in Syria, today.**

9. Having discussed the factual circumstances and complexities surrounding XBHA in Syria, the basic legal positions advanced in this document (which will be supplemented and developed as the coordinated strategic advocacy campaigns of ARCS and G37 continue) are that:
  - (A) XBHA in Syria is lawful for UN Agencies and States in the absence of a UNSC mandate;
  - (B) in the alternative, XBHA in the absence of a UNSC mandate is at the very least legally justified for UN Agencies and States on the basis of the facts of the Syrian conflict; and
  - (C) Non-Governmental Organisations (“NGOs”) are not prohibited from engaging in XBHA operations under international law *per se*.
10. The views taken in this document do not constitute legal advice and are for general information purposes only.

## II. FACTUAL BACKGROUND TO XBHA IN SYRIA

11. Syria has been embroiled in armed conflict for 11 years, as a result of which 13.4M Syrians remain in need, 12.4M are food insecure, 6.7M are classed as Internally Displaced Persons, and 5.6M are refugees,<sup>3</sup> in an unprecedented humanitarian crisis that has been described as the “*worst man-made disaster since World War II*”.<sup>4</sup>
12. Despite this decade of suffering, however, UN entities have documented how Syrian Authorities and their allies have over the course of the conflict systematically obstructed humanitarian access to Syrians in need, often using it as part of ‘siege warfare’ tactics against civilians in rebel-held areas and/or ruthlessly profiteering from it.<sup>5</sup>

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<sup>3</sup> See, OCHA [‘Humanitarian needs overview 2021’](#).

<sup>4</sup> United Nations, [‘Syria “Worst Man-Made Disaster Since World War II” – UN Rights Chief’](#) (UN News, 14 March 2017).

<sup>5</sup> See, UN High Commissioner for Human Rights [‘Zeid Ra’ad Al Hussein statement on Syria : Suffering of civilians in Eastern Ghouta “an outrage”](#) GENEVA (27 October 2017) (emphasis added). See also, HRC, [‘Report of the Independent International Commission of Inquiry on The Syrian Arab Republic’](#) (22 February 2012) A/HRC/19/69, at [73]; HRC, [‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’](#) (18 July 2013) A/HRC/23/58, *inter alia* at [33-34] [143-144]; HRC, [‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’](#) (16 August 2013) A/HRC/24/46, *inter alia* at [172]; HRC, [‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’](#) (12 February 2014) A/HRC/25/65, *inter alia* at [132]; HRC, [‘Report of the independent international commission of inquiry on the Syrian Arab Republic’](#) (13 August 2014) A/HRC/27/60, *inter alia* at [124]; HRC, [‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’](#) (05 February 2015) A/HRC/28/69, *inter alia* at [10-11]; HRC, [‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’](#) (13 August 2015) A/HRC/30/48, *inter alia* at [100-101]; HRC, [‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’](#) (11 February 2016) A/HRC/31/68, *inter alia* at [146]; HRC, [‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’](#) (11 August 2016) A/HRC/33/55, *inter alia* at [37, 120]; HRC, [‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’](#) (02 February 2017) A/HRC/34/64, *inter alia* at [95]; HRC, [‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’](#) (08 August 2017), at Annex III, [1]; HRC, [‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’](#) (01 February 2018) A/HRC/37/72, *inter alia* at [70]; HRC, [‘Report of the Independent International Commission of Inquiry on the Syrian Arab Republic’](#) (21 January 2021) A/HRC/46/54, at [45-46]; Independent International Commission of Inquiry of the Syrian Arab Republic, [‘Sieges as a Weapon of War: Encircle, Starve, Surrender, Evacuate’](#) (29 May 2018), *inter alia*, at [9-11]; HRC [‘Report of the Independent International Commission of Inquiry of the Syrian Arab Republic: The Siege and Recapture of Eastern Ghouta’](#): Conference Room Paper’ (20 June 2018) A/HRC/38/CRP.3, *inter alia* at [27].

13. Partly due to this obstruction of humanitarian access by the Syrian Government (and, to some extent, various opposition groups)<sup>6</sup>, on 14 July 2014 the UNSC took steps to bolster the legal basis for XBHA in Syria by unanimously adopting Resolution 2165 (2014), which authorised cross-border deliveries of aid through four border crossings: two on the Turkish border (Bab al-Salam and Bab al-Hawa), one on the border with Iraq (Al Yarubiyah), and one on the border with Jordan (Al-Ramtha).<sup>7</sup>
14. Whilst understandable at a time when (in contrast to the present facts) the fractured and fast-moving nature of the Syrian conflict precluded reliable humanitarian negotiations with parties in effective control of Syrian territory, the invitation of UNSC involvement was unprecedented in UN aid operations.
15. As will become apparent during the course of this analysis, there is no conclusive legal basis demonstrating that it was in fact necessary to seek and concretise a UNSC mandated Cross-Border Mechanism (“CBM”) to implement XBHA in Syria.<sup>8</sup> This is reflected in the fact that nearly a decade after its introduction, even the UN Secretary General was, in calling for a renewal of the CBM mandate, only willing to put matters as high as inviting “*members of the Council to [maintain consensus on allowing](#)*

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<sup>6</sup> United Nations, ‘[Humanitarian Needs Outpacing Response Amid Ongoing Obstacles to Aid Delivery in Syria](#)’, (UN News, 26 June 2014).

<sup>7</sup> UNSC Resolution 2165 (2014), S/RES/2165 (14 July 2014).

<sup>8</sup> The UN Office for the Coordination of Humanitarian Affairs, the body responsible for coordinating the macro-level humanitarian aid structures in Syria, does not report to the UNSC, and is therefore not accountable to it. Rather, it reports, ultimately, to the UN Secretary General. Whilst it may have been possible for the UNSC to authorise XBHA in Syria, there is no precedent within UN (cross-border-) aid operations to suggest that it was necessary for it to do so. See for overview, OCHA ‘[OCHA on Message: General Assembly Resolution 46/182](#)’. See also, Rebecca Barber, ‘[Is Security Council Authorisation Really Necessary to Allow Cross Border Humanitarian Assistance in Syria?](#)’ (24 February 2020, EJIL Talk). See further, [below](#).

*cross-border operations, by renewing resolution 2585 for an additional twelve months*<sup>9</sup> (emphasis added).

16. Nonetheless, regardless of its necessity, over the years of its operation, the UNSC mandate for the CBM was seen to bolster the power(s) of UN Agencies and their humanitarian partners to engage in XBHA without regard to the protests of Syrian Authorities, requiring those humanitarian partners to merely notify those Authorities to do so.
17. Initially proposed for a period of 180 days, UNSC authorisation for the CBM was later extended by 12 months and renewed quasi-annually by a series of Resolutions from 2014 until today. However, despite the humanitarian imperative underpinning the UNSC's willingness to mandate XBHA in northern Syria, as the conflict has shifted over time it has become apparent that inviting the UNSC's involvement has politicised what is for millions of people life-saving and preserving aid.<sup>10</sup>
18. As years went on, Russia began to increase its opposition to the CBM and in December 2019, only two of the four crossings were renewed (those accessing north-west Syria over the border with Türkiye), for a total of 6 months, Russia and China exercising their veto powers in respect of the others.<sup>11</sup>
19. Since July 2020, just one UN-authorized border crossing, Bab al-Hawa, has remained open, and is now seen as the final crossing through which UN Agencies can, through

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<sup>9</sup> United Nations Secretary General, '[Secretary-General's remarks to the Security Council - on the humanitarian situation in Syria \[as delivered\]](#)', (UN.org, 20 June 2022).

<sup>10</sup> See, e.g., John Alterman and Carsten Weiland, '[The Politicisation of Aid in Syria](#)' (29 June 2021, CSIS).

<sup>11</sup> Michelle Nichols, '[Russia, Backed By China, Casts 14<sup>th</sup> U.N. Veto On Syria to Block Cross-Border Aid](#)', (Reuters, 20 December 2019).

their humanitarian partners, deliver aid and support without the prior authorisation and vetting of the Syrian Authorities.

20. On 11 July 2020, the UNSC adopted Resolution 2533 (2020), which approved delivery of aid through Bab al-Hawa for a total of 12 months, until 10 July 2021.<sup>12</sup> However, on 09 July 2021, Resolution 2585 (2021) was unanimously adopted, which again authorised the only border crossing to Bab al-Hawa for only 6 months, with an automatic extension of an additional 6 months.<sup>13</sup> On 11 January 2022, the UNSC duly renewed the CBM mandate without a new vote, but again only for 6 months, until 10 July 2022.<sup>14</sup>
21. In the lead up to 10 July 2022, it was uncertain as to whether the CBM mandate would be renewed again, following consistent and sustained threats from the Russian delegations that they would use their veto powers to prevent a further renewal.<sup>15</sup>
22. However, matters were ultimately resolved in the interim when the UNSC were able to agree (or, for some parties, acquiesce) to a proposal for a 6-month extension to the present UNSC mandate.<sup>16</sup> The renewal of the mandate was and is a welcome step, as the importance of Bab-al-Hawa cannot be overstated as regards the funding, procurement, and logistics operations associated with humanitarian aid in north/north-

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<sup>12</sup> UNSC Resolution 2533 (2020), S/RES/2533 (13 July 2020).

<sup>13</sup> UNSC Resolution 2585 (2021), S/RES/2585 (9 July 2021).

<sup>14</sup> Security Council Report, '[February 2022 Monthly Forecast](#)' (31 January 2022).

<sup>15</sup> The use of the veto in this case attracted extremely strong rebukes from the international community for its politicisation of lifesaving aid needed for the survival of 4.1M people in north and north-west Syria. In debates following the use of the veto, numerous States stressed the applicable provisions of IHL and called for the depolarization of aid provision in Syria. See, *inter alia*, UN Audio-Visual Library, '[General Assembly: 95th Plenary Meeting, 76th Session](#)' (21 July 2022); UN Audio-Visual Library, '[General Assembly: 96th Plenary Meeting, 76th Session](#)' (21 July 2022).

<sup>16</sup> UN News, '[Syria: Security Council Extends Cross-Border Aid Delivery for Six Months](#)' (12 July 2022, UN News). The language of this Resolution was initially that of 'co-penholders' Norway and Ireland, but was in line with Russian proposals in terms of the length of the Resolution.

west Syria, the closure of which (contrary to Russian and Syrian claims) would be catastrophic. Nonetheless, the uncertainty surrounding the continued provision of aid unequivocally demonstrated two facts: first, that the UNSC mandate for the CBM will not continue for the entirety of the period in which it remains necessary; and second, that in the event of non-renewal, the avoidance of a foreseeable humanitarian catastrophe<sup>17</sup> demands that States, UN Agencies, and NGOs presently engaged in the provision of cross-border aid be aware of their rights to continue doing so even without the extension of a UNSC mandate.

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<sup>17</sup> *"The current authorization will expire in mid-winter, when needs are typically at their highest" due to harsh conditions in northern Syria and "appropriate arrangements must be put in place" – HRC, [Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#), A/HRC/51/45, at [10].*

### III. THE OPERATIONAL REALITY OF XBHA IN SYRIA

23. In addition to the basic factual context, it is relevant to understand the factual reality of UN-Coordinated XBHA in Syria, which (far from the images of 'UN-branded' truck convoys which may come to mind when speaking of 'UN XBHA') consists exclusively of the indirect provision of aid items through, and the granting of financial and logistical assistance to, NGO third-party implementing partners.
24. As will be seen below, these facts are intrinsically important to hypothetical issues of legal attribution and erroneous claims that present and/or foreseeable XBHA arrangements violate Syrian territorial integrity (see, [ISSUE \(A\): XBHA IN SYRIA IS LAWFUL FOR UN AGENCIES AND STATES WITHOUT A UNSC MANDATE](#), and [ISSUE \(C\): NGOs CAN CONTINUE TO PROVIDE XBHA UNDER RELEVANT RULES OF PUBLIC INTERNATIONAL LAW](#)).
25. The facts below are primarily compiled from the independent reports of the Secretary General and UN Standard Operating Procedures and have been supplemented by the lived professional experience of ARCS members actively involved with UN Agencies as local implementing partners for the delivery of XBHA within Syria.
26. As is the case in disaster management across the globe, the coordinated humanitarian response in Syria is centrally premised upon the use of 'clusters', i.e., *"groups of humanitarian organizations, both UN and non-UN, in each of the main sectors of humanitarian action (water, health, shelter, logistics, etc.)."*<sup>18</sup>

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<sup>18</sup> UNHCR, '[Emergency Handbook](#)'. Clusters include: **camp coordination and camp management** (led by the UN Refugee Agency and the International Organisation for Migration); **early recovery** (led by the UN Development Programme); **education** (led by the UN International Children's Emergency Fund and Save the Children); **emergency telecommunications** (led by the World Food Programme); **food security** (led by the World Food Programme and the Food and Agriculture Organisation); **health** (led by the World Health Organisation); **logistics** (led by the World Food Programme); **nutrition** (led by the UN International Children's Emergency Fund); **protection** (led by the UN Refugee Agency); **shelter** (led by the International Federation of the Red Cross and Red Crescent and the UN Refugee Agency);

27. Coordination between clusters and agencies is administered by the United Nations Office for the Coordination of Humanitarian Affairs (“OCHA”), which was created by the UN Secretary General in 1998, when it replaced its predecessor, the Department for Humanitarian Affairs.<sup>19</sup> The Head of OCHA serves as the Under Secretary General for Humanitarian Affairs and the Emergency Relief Coordinator (“ERC”), the latter of which was also created “*following a request by the General Assembly to strengthen coordination of humanitarian emergency assistance of the UN.*”<sup>20</sup>
28. OCHA is the secretariat of the Inter-Agency Standing Committee, which was also established by the General Assembly<sup>21</sup> “*to coordinate the inter-agency humanitarian response to disasters and emergencies*” and “*consists of the heads of the operational UN agencies and certain other actors, and is chaired by the Emergency Relief Coordinator.*”<sup>22</sup>
29. In respect of the cluster system in Syrian XBHA and beyond, OCHA:

*“works with the United Nations agencies and humanitarian partners including international organizations, Syrian NGOs, Turkish NGOs and various governmental and other authorities to support needs assessments,*

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and **water, sanitation, and hygiene** (led by the UN International Children's Emergency Fund) - Philippa Web, Rosalyn Higgins, Dapo Akande, Sandesh Sivakumaran, James Sloan, Oppenheim's International Law: United Nations (OUP, 2017), 716.

<sup>19</sup> Philippa Web, Rosalyn Higgins, Dapo Akande, Sandesh Sivakumaran, James Sloan, Oppenheim's International Law: United Nations (OUP, 2017), 712.

<sup>20</sup> *Ibid*, 710.

<sup>21</sup> UN General Assembly Resolution 48/182 UNGA Res A/RES/46/182 (19 December 1991). The ERC is responsible for, *inter alia*, processing requests from member States, coordinating and facilitating the UN response to emergencies, preparing appeals and situation reports, facilitating access to areas affected by an emergency, managing the Central Emergency Revolving Fund, serving as the focal point for interested actors, and providing information to other actors - Philippa Web, Rosalyn Higgins, Dapo Akande, Sandesh Sivakumaran, James Sloan, Oppenheim's International Law: United Nations (OUP, 2017), 714.

<sup>22</sup> Philippa Web, Rosalyn Higgins, Dapo Akande, Sandesh Sivakumaran, James Sloan, Oppenheim's International Law: United Nations (OUP, 2017), 713.



*identification and analysis of needs, share information on the response, provide access analysis and facilitate the operating environment including on border crossing regulations. OCHA supports the southern Türkiye coordination architecture comprised of nine clusters, the Inter-Cluster Coordination Group, other coordination forums and the Humanitarian Liaison Group under the leadership of the Deputy Regional Humanitarian Coordinator...OCHA Türkiye is responsible for the daily management of all programmatic and financial aspects of the Syria Cross-border Humanitarian Fund on behalf of the Deputy Regional Humanitarian Coordinator. The THF provides funding for projects which are in line with priorities and objectives of the Syria Humanitarian Response Plan.”<sup>23</sup>*

30. Syrian XBHA is primarily the concern of the ‘Logistics Cluster’, which, led by the World Food Programme (“WFP”), is responsible for “*scheduling...cross-border deliveries, managing the trans-shipment area (including hiring labour to trans-ship from Turkish to Syrian trucks), liaising with customs agencies and ensuring information-sharing and coordination among the United Nations entities and implementing partners.*”<sup>24</sup>
31. Procurement for aid items is carried out in accordance with relevant Guidelines and International Tender Practices, and is assisted and coordinated (but, importantly, not directed) by UN Agencies,<sup>25</sup> which manage their procurement practices in collaboration with third-party local NGO implementation partners.<sup>26</sup> Needs are

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<sup>23</sup> OCHA, ‘[Syria Hub](#)’. See also, Philippa Web, Rosalyn Higgins, Dapo Akande, Sandesh Sivakumaran, James Sloan, Oppenheim’s International Law: United Nations (OUP, 2017), 711.

<sup>24</sup> UNSC, ‘[Review of United Nations Humanitarian Cross-Line And Cross-Border Operations: Report of the Secretary-General](#)’ (14 May 2020) S/2020/401, at [23]; Logistics Cluster, ‘[Standard Operating Procedures \(SOPs\) – UN Cross-Border Operations from Türkiye to Syria](#)’ (October 2022), at [1].

<sup>25</sup> Report on the Procurement and Transshipment Experiences of ARCS Members Engaged as Local Implementation Partners in Respect of UN-Coordinated XBHA in Syria – on file with author.

<sup>26</sup> *Ibid.*

communicated to the UN through the Annual Humanitarian Needs Overview, although individual UN Agencies involved in aid delivery also regularly assess needs through third-party in-country monitoring operations and joint assessments “*including in response to systemic shocks, such as the COVID-19 pandemic*”.<sup>27</sup> Once procured, goods are stored and packaged in UN warehousing facilities near the UN border crossing in Türkiye, ready to be shipped to local implementing partners in Syria.<sup>28</sup>

32. Based on those assessments, individual cross-border shipments are initiated by the UN and coordinated with local humanitarian partners,<sup>29</sup> which are required to provide detailed information on the Syrian trucks (plate number, truck type, brand, colour) and Syrian drivers (name, ID number, phone number) employed by them at least 24-hours prior to the operation with the Logistics Cluster, which transmits these details to Türkiye authorities and OCHA.<sup>30</sup>
33. Once goods have been procured, and based on relevant needs assessments, individual cross-border shipments are initiated by UN Agencies in coordination with humanitarian partners, such as food security or health clusters.<sup>31</sup>
34. A week prior to the day of transshipment, UN Agencies submit their shipment plan to WFP, by which they detail: (a) the approximate number of trucks expected; (b) the type and quantity of cargo; (c) tentative movement date; (d) destination (by

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<sup>27</sup> UNSC, ‘[Review of United Nations Humanitarian Cross-Line And Cross-Border Operations: Report of the Secretary-General](#)’ (14 May 2020) S/2020/401, at [21].

<sup>28</sup> Report on the Procurement and Transshipment Experiences of ARCS Members Engaged as Local Implementation Partners in Respect of UN-Coordinated XBHA in Syria – on file with author.

<sup>29</sup> UNSC, ‘[Review of United Nations Humanitarian Cross-Line And Cross-Border Operations: Report of the Secretary-General](#)’ (14 May 2020) S/2020/401, at [22].

<sup>30</sup> Logistics Cluster, ‘[Standard Operating Procedures \(SOPs\) – UN Cross-Border Operations from Türkiye to Syria](#)’ (October 2022), at [1].

<sup>31</sup> UNSC, ‘[Review of United Nations Cross-Border Operations: Report of the Secretary-General](#)’ (19 June 2018) S/2018/617, at [10].

Governorate, District, Sub-district, Community); and (e) number of targeted beneficiaries. The final versions of the shipment plans are shared with OCHA, which compiles them to produce a notification, which it signs, stamps and submits to the Government of Syria and the Government of Türkiye 48-hours (in working days) prior to the first crossing date indicated in the notification.<sup>32</sup>

35. On the day of shipment, empty Syrian trucks (arriving from the Syrian side of the border) arrive in convoy ready for examination at the Syrian side of the Syria-Türkiye border at 6:00am, where they are gathered and prioritised by customs brokers arranged by UN Agencies. All empty Syrian trucks are screened with an x-ray machine in Türkiye customs and escorted to the weighbridge area.<sup>33</sup>
36. Simultaneously, on the Türkiye side of the border, goods are loaded, sealed, and taken to the border in Türkiye trucks<sup>34</sup> where they are taken to a separate<sup>35</sup> transshipment hub near the Bab al-Hawa crossing in Türkiye, offloaded, and subsequently reloaded onto Syrian trucks.<sup>36</sup> This process is overseen by staff at the United Nations Monitoring Mechanism (“UNMM”), who serve to verify the waybills and

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<sup>32</sup> Logistics Cluster, [‘Standard Operating Procedures \(SOPs\) – UN Cross-Border Operations from Türkiye to Syria’](#) (October 2022), at [1].

<sup>33</sup> *Ibid*, at [4].

<sup>34</sup> UNSC, [‘Review of United Nations Humanitarian Cross-Line And Cross-Border Operations: Report of the Secretary-General’](#) (14 May 2020) S/2020/401, at [23]; UNSC, [‘Review of the United Nations Humanitarian Cross-Line and Cross-Border Operations: Report of the Secretary General’](#) (15 December 2021) S/2021/1030, at [19].

<sup>35</sup> UNSC, [‘Review of United Nations Humanitarian Cross-Line And Cross-Border Operations: Report of the Secretary-General’](#) (14 May 2020) S/2020/401, at [24].

<sup>36</sup> UNSC, [‘Review of the United Nations Humanitarian Cross-Line and Cross-Border Operations: Report of the Secretary General’](#) (15 December 2021) S/2021/1030, at [19]. It is a requirement that trucks, *inter alia*: should not have more than 70 litres of fuel when crossing into Türkiye; should have only one person (the driver) in the vehicle; must be ensured to drive on Türkiye’s roads; and must have a Syrian license plate (and not a third-country plate) - [‘Standard Operating Procedures \(SOPs\) – UN Cross-Border Operations from Türkiye to Syria’](#) (October 2022), at [1]. Syrian drivers are usually employed or subcontracted by relevant implementing partners from third-party transport agencies which are capable of dealing with issues such as the arrangement of insurance for their drivers - Report on the Procurement and Transshipment Experiences of ARCS Members Engaged as Local Implementation Partners in Respect of UN-Coordinated XBHA in Syria – on file with author.

ensure that the cargo is consistent with the assistance previously announced by physically checking the consignments through the use of random checks and verifications.<sup>37</sup>

37. When loading has been completed, monitoring officers ensure that the trucks are properly closed and monitor the application of seals by customs officials. Those trucks are then assembled in convoy under their oversight and continue to be monitored as they progress to the border so as to ensure that no manipulation of the consignments or reopening of the trucks takes place.<sup>38</sup>
38. Once the process is complete, the Syrian trucks are escorted in convoy by UNMM staff and others to the border. When they cross the second gate of the Türkiye border, transshipment is complete and the UNMM will notify local officials of completion.<sup>39</sup> **UN personnel do not accompany the trucks across the Syrian border.**
39. Once the trucks have crossed the border, UNMM Officers notify the Syrian Authorities confirming the humanitarian nature of the consignment.<sup>40</sup>
40. Once across the border, the Syrian trucks, driven by Syrian drivers, arrive at warehouses rented by implementing partners<sup>41</sup> and managed by (vetted) local third-

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<sup>37</sup> UNSC, '[Review of the United Nations Humanitarian Cross-Line and Cross-Border Operations: Report of the Secretary General](#)' (15 December 2021) S/2021/1030, at [19].

<sup>38</sup> *Ibid*, at [20].

<sup>39</sup> [Standard Operating Procedures \(SOPs\) – UN Cross-Border Operations from Türkiye to Syria](#)' (October 2022), at [4].

<sup>40</sup> UNSC, '[Review of the United Nations Humanitarian Cross-Line and Cross-Border Operations: Report of the Secretary General](#)' (15 December 2021) S/2021/1030, at [20]

<sup>41</sup> Goods imported across the UN CBM are supplemented by those brought across a commercial border crossing from Türkiye to Syria. Warehouses rented and managed by local implementation partners will contain a mixture of these goods. Occasionally, UN Agencies will reimburse local implementation partners for the storage of goods in their warehouses that may be picked up and transferred between projects managed by different UN Agencies or stored to ensure shock/disaster relief capacity. Available warehousing capacity may be advertised on the Logistics Cluster website, however, the Logistics Cluster contains a mixture of UN Agencies and local implementing partners, and the warehousing capacity remains private in nature, see, Report on the Procurement and Transshipment Experiences of

party monitors (sub-)contracted by the UN,<sup>42</sup> the latter of which serve to observe distribution to beneficiaries or to facilities such as schools and health centres. At distribution points, videos and time-stamped, geotagged photographs are used to confirm delivery.<sup>43</sup>

41. Through this remotely managed system, the UN (even without crossing the Syrian border) ensures a safe, secure, and import/customs duty-free<sup>44</sup> mechanism for the delivery of impartial humanitarian aid that has facilitated the delivery of almost 50,000 truck-loads of aid to across the Syrian border<sup>45</sup> (an average of around 800 per month),<sup>46</sup> the immensity of the operation during the most recent reporting period being contextualised by the UN Secretary General in June 2022 as such:

*“Among the cross-border humanitarian assistance delivered into the north-west of the Syrian Arab Republic, WFP delivered food assistance for some 1.33 million people in April and dispatched food assistance to 1.37 million in May (as at 25 May). UNICEF provided multisectoral assistance to 553,000 people during the reporting period. To respond to the urgent shelter and*

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ARCS Members Engaged as Local Implementation Partners in Respect of UN-Coordinated XBHA in Syria – on file with author.

<sup>42</sup> These third-party monitors are local, Syrian individuals often acting for private firms with whom the UN sub-contracts to carry out its monitoring operations in Syria. They are not Staff employed directly by the UN, whether by the UNMM or otherwise, see Report on the Procurement and Transshipment Experiences of ARCS Members Engaged as Local Implementation Partners in Respect of UN-Coordinated XBHA in Syria – on file with author.

<sup>43</sup> UNSC, ‘[Review of the United Nations Humanitarian Cross-Line and Cross-Border Operations: Report of the Secretary General](#)’ (15 December 2021) S/2021/1030, at [22].

<sup>44</sup> Commercial procurement through the commercial crossing entails significant customs and tax duties which are not owed on CBM facilitated aid deliveries, see, Report on the Procurement and Transshipment Experiences of ARCS Members Engaged as Local Implementation Partners in Respect of UN-Coordinated XBHA in Syria – on file with author.

<sup>45</sup> United Nations Secretary General, ‘[Secretary-General's remarks to the Security Council - on the humanitarian situation in Syria \[as delivered\]](#)’, (UN.org, 20 June 2022).

<sup>46</sup> *Ibid.* One ARCS Member interviewed by ARCS estimated that they received as much as 60% of their total aid deliveries through the CBM, see, Report on the Procurement and Transshipment Experiences of ARCS Members Engaged as Local Implementation Partners in Respect of UN-Coordinated XBHA in Syria – on file with author.

*basic needs of displaced persons and host communities between 1 April and 22 May 2022, UNHCR assisted 177,500 people through 16 cross-border trans-shipments through the Bab al-Hawa crossing. The International Organization for Migration brought multisectoral assistance to 256,250 people. UNFPA supported more than 43,000 people with life-saving reproductive health and gender-based violence prevention and response services. WHO delivered eight truckloads of medical supplies, enough to provide more than 720,000 treatments, into the north-west of the country.”<sup>47</sup>*

42. Again, as will be seen below, these facts are intrinsically important to hypothetical issues of legal attribution and erroneous claims that present and/or foreseeable XBHA arrangements violate Syrian territorial integrity.

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<sup>47</sup> UNSC, [‘Implementation of Security Council resolutions 2139 \(2014\), 2165 \(2014\), 2191 \(2014\), 2258 \(2015\), 2332 \(2016\), 2393 \(2017\), 2401 \(2018\), 2449 \(2018\), 2504 \(2020\), 2533 \(2020\) and 2585 \(2021\) Report of the Secretary-General’](#) (16 June 2022) S/2022/492, at [38].

## IV. THE INSUFFICIENCY OF ‘CROSS-LINE’ AID IN SYRIA

43. Having provided the contextual position above, and prior to any analysis of the legal bases for cross-border aid in Syria, it is also necessary to confront the fact that the Syrian Authorities are not opposed to the provision of international aid *per se*. Instead, they object specifically to the provision of XBHA and demand that aid flow through Damascus, under their control, to then subsequently be provided across conflict lines to areas in need in north/north-west Syria (known as ‘cross-line’ aid as opposed to ‘cross-border’ aid). This will be relevant in later discussions relating, *inter alia*, to the arbitrariness of the Syrian Authorities’ refusal to permit UN-coordinated XBHA and the legal justifiability of continuing to do so without their consent and the absence of a UNSC mandate (see, [ISSUE \(B\): XBHA IN SYRIA IS LEGALLY JUSTIFIED FOR UN AGENCIES AND STATES IN THE ABSENCE OF A UNSC MANDATE](#)).
44. Some ‘cross-line operations’ are taking place presently, with the UN providing at least five such convoys to deliver aid and assistance to thousands in need, with more to follow.<sup>48</sup> However, in its present (and reasonably foreseeable future) form, cross-line operations have been confirmed to have, at best, the potential to “*reach thousands but not millions*”.<sup>49</sup> The actual and foreseeable capacity of cross-line aid thus pales in comparison to the almost 50,000 trucks<sup>50</sup> that have crossed and continue to cross into Syria via XBHA thus far to provide aid which remains vital for the 4.1M people in

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<sup>48</sup> United Nations Secretary General, ‘[Secretary-General's remarks to the Security Council - on the humanitarian situation in Syria \[as delivered\]](#)’, (UN.org, 20 June 2022).

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

north-west Syria requiring humanitarian assistance in 2022 and beyond (20% more than those reliant on such aid in 2021).<sup>51</sup>

45. Indeed, even if cross-line operations had the hypothetical operational capacity to reach the number of people reliant on it, which it does not and cannot,<sup>52</sup> past experience of the escalating humanitarian consequences of the closure of former UN border crossings, and the history of the Syrian Authorities' intentional disruption<sup>53</sup> to and weaponization<sup>54</sup> of aid provision, overwhelmingly suggest that switching humanitarian infrastructures to Damascus would impact fatally upon the quality and

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<sup>51</sup> OCHA, '[ASG Msuya Echoes Call for Renewal of Cross-Border Response into Syria](#)' (OCHA, 29 July 2022); OCHA, '[North-West Syria: Situation Report](#)'; ECHO, '[Why Humanitarian Aid Needs to Get Through](#)' (04 July 2022, ECHO).

<sup>52</sup> See, '[Report of the Secretary General, Implementation of Security Council resolutions 2139 \(2014\), 2165 \(2014\), 2191 \(2014\), 2258 \(2015\), 2332 \(2016\), 2393 \(2017\), 2401 \(2018\), 2449 \(2018\), 2504 \(2020\), 2533 \(2020\) and 2585 \(2021\)](#)' 19 April 2022, S/2022/30, at [40-43, 57 (note following Table Four), 60-67, 77]

<sup>53</sup> HRC, '[UN Commission of Inquiry: Attacks, Sieges of Civilian Areas Are Leading to Mass Casualties and Starvation In Syria](#)', (HRC, 05 March 2014); HRC, '[Country Reports A/HRC/46/54: Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)' (21 January 2021); See, UN High Commissioner for Human Rights '[Zeid Ra'ad Al Hussein statement on Syria : Suffering of civilians in Eastern Ghouta "an outrage"](#)' GENEVA (27 October 2017) (emphasis added).

<sup>54</sup> See HRC, '[Report of the Independent International Commission of Inquiry on The Syrian Arab Republic](#)' (22 February 2012) A/HRC/19/69, at [73]; HRC, '[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)' (18 July 2013) A/HRC/23/58, *inter alia* at [33-34] [143-144]; HRC, '[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)' (16 August 2013) A/HRC/24/46, *inter alia* at [172]; HRC, '[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)' (12 February 2014) A/HRC/25/65, *inter alia* at [132]; HRC, 'Report of the independent international commission of inquiry on the Syrian Arab Republic' (13 August 2014) A/HRC/27/60, *inter alia* at [124]; HRC, '[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)' (05 February 2015) A/HRC/28/69, *inter alia* at [10-11]; HRC, '[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)' (13 August 2015) A/HRC/30/48, *inter alia* at [100-101]; HRC, '[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)' (11 February 2016) A/HRC/31/68, *inter alia* at [146]; HRC, '[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)' (11 August 2016) A/HRC/33/55, *inter alia* at [37, 120]; HRC, '[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)' (02 February 2017) A/HRC/34/64, *inter alia* at [95]; HRC, '[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)' (08 August 2017), at Annex III, [1]; HRC, '[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)' (01 February 2018) A/HRC/37/72, *inter alia* at [70]; HRC, '[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)' (21 January 2021) A/HRC/46/54, at [45-46]; Independent International Commission of Inquiry of the Syrian Arab Republic, '[Sieges as a Weapon of War: Encircle, Starve, Surrender, Evacuate](#)' (29 May 2018), *inter alia*, at [9-11]; HRC '[Report of the Independent International Commission of Inquiry of the Syrian Arab Republic: The Siege and Recapture of Eastern Ghouta](#)': Conference Room Paper' (20 June 2018) A/HRC/38/CRP.3, *inter alia* at [27].



quantity of aid provision in north and north-west Syria, perpetuating humanitarian crises and causing massive humanitarian consequences for the people living there.<sup>55</sup>

46. As such, whilst it may act as a useful compliment to the CBM at present, cross-line aid *“is not at the scale needed to replace the massive cross-border response”*<sup>56</sup> and cannot act as a proper substitute the present humanitarian impact of cross-border aid in Syria, which remains essential to the survival of millions in the north/north-west of the country.<sup>57</sup>

47. As will be shown below, a focus on cross-line and denial of XBHA can therefore have legal implications for issues of arbitrariness and the responsibility of the UN (see, [ISSUE \(B\): XBHA IN SYRIA IS LEGALLY JUSTIFIED FOR UN AGENCIES AND STATES IN THE ABSENCE OF A UNSC MANDATE](#)).

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<sup>55</sup> See, e.g., UN Secretary General, [‘Secretary-General’s remarks to the Security Council - on the humanitarian situation in Syria \[as delivered\]’](#), (UN.org, 20 June 2022); UN, [‘António Guterres \(UN Secretary-General\) on Syria - Security Council Media Stakeout’](#) (UN, 12 July 2022); UNHCR, [‘UN Humanitarian Leaders Call for the Renewal of Cross-Border Aid Authorization to Northwest Syria’](#) (16 June 2022), endorsed by Martin Griffiths, Emergency Relief Coordinator, OCHA, Catherine Russell, Executive Director, UNICEF, Natalia Kanem, Executive Director, UNFPA, António Vitorino, Director General, IOM, David Beasley, Executive Director, WFP, Filippo Grandi, High Commissioner For Refugees, UNHCR, and Dr Tedros Adhanom Ghebreyesus, Director General, WHO; Mat Nashed, [‘Aid Groups Urge UN to Reauthorize Syria Crossings as Deadline Looms’](#) (Devex, 23 April 2021); Human Rights Watch, [‘Syria: Russian Veto Would Shut Down Last Aid Lifeline’](#) (HRW, 10 June 2021); The Soufan Centre, [‘IntelBrief: The Point Of No Return? Cross-Border Aid In Syria Under Threat’](#) (The Soufan Centre, 09 July 2021); Human Rights Watch, [‘UN Security Council: Restore Syria Cross Border Aid’](#) (HRW, 07 July 2021); PAX, [‘Siege Watch Final Report: Out of Sight, Out of Mind, The Aftermath of Syria’s Sieges’](#) (PAX, 06 March 2019).

<sup>56</sup> United Nations Secretary General, [‘Secretary-General’s remarks to the Security Council - on the humanitarian situation in Syria \[as delivered\]’](#), (20 June 2022, UN News).

<sup>57</sup> It is noted in this regard that the issue of XBHA vs. cross-line aid is also not simply an issue of scale, and instead raises issues including the complexity of cross-border operations which involve, for example, personnel operations and involvement that is simply not replaceable by cross-line aid. Further reference must also be had to the cost effectiveness associated with the delivery of aid from Bab Al-Hawa to the Greater Idlib Area, compared with it sent from Damascus and, in all circumstances, the need to remain accountable to affected populations, most of them having been besieged before, and thus refusing to fall under the control of those same forces once again.

## V. THE SYRIAN CONFLICT TODAY: 2014 IS NOT 2022

48. As noted at the outset, this document compiles (rather than creates) relevant legal avenues for the continuation of UN-Coordinated XBHA and applies them to the Syrian conflict (and only the Syrian conflict) as it stands today, the simple focus being to stress that **whilst the UNSC mandate may have given a clearer legal basis for doing so in the fractured and fast-moving Syrian conflict in 2014, it is now, in 2022, just one legal basis upon which UN Agencies may continue to provide XBHA in Syria.**
49. As a further preliminary matter, this Section therefore explores the changes in the Syrian conflict from 2014 to 2022 that now make the legal bases advanced here (see, [ISSUE \(A\): XBHA IN SYRIA IS LAWFUL FOR UN AGENCIES AND STATES WITHOUT A UNSC MANDATE](#)) more viable than ever before as options to continue the provision of UN-Coordinated XBHA in the absence of a UNSC mandate.

### What has changed in the Syrian conflict between 2014 and 2022?

50. **Intensity and Scope:** in 2014, the Syrian conflict had grown in intensity and scope<sup>58</sup> and become deeply fragmented, characterised by the emergence of multiple frontlines involving numerous different parties with shifting, short term priorities usually focussed on local operational and socioeconomic particularities rather than the broader context of the conflict.<sup>59</sup> Government forces (assisted by their greater firepower and support from the increasing proliferation of pro-government paramilitaries and militias)<sup>60</sup> regained several strategic areas through the use of heavy

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<sup>58</sup> HRC, '[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)' (13 August 2014) A/HRC/27/60, at [7]

<sup>59</sup> *Ibid*, at [8].

<sup>60</sup> *Ibid*, at [7].

firepower and the systematic engagement of irregular and foreign forces,<sup>61</sup> threatening armed opposition strongholds in Damascus and Aleppo in doing so.<sup>62</sup>

51. Where they were not actively engaged in conflict, some Islamic Front affiliated non-State armed groups employed siege warfare, encircling Nubul and Zahra, besieging and denying humanitarian access to 45,000 people. However, these tactics were “*mostly employed by the Government and its affiliates*”.<sup>63</sup> Despite being initially intended as partial sieges aimed at expelling armed groups, such Government sieges turned into tight blockades that prevented the delivery of basic supplies (including food and medicine) as part of a “*starvation until submission*” campaign,<sup>64</sup> being implemented in towns across Syria so as to instrumentalise basic human needs for water, food, shelter and medical care, as part of its military strategy. Government forces also relentlessly shelled and bombarded besieged areas and burned crops, moving on to restrict distribution of and confiscate humanitarian aid, including surgical supplies food, fuel and medicine, “*leading to malnutrition and starvation*”.<sup>65</sup>
52. In 2022, however, much of the Greater Idlib Area remains under the control of non-State armed groups, and conflict in the area “[*faces*] a continuing stalemate”.<sup>66</sup> As the last of three originally demarcated ‘de-escalation zones’, its front lines have remained largely “*frozen*”.<sup>67</sup> Whilst some violence (such as mutual shelling at front lines)

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<sup>61</sup> *Ibid*, at [11].

<sup>62</sup> *Ibid*.

<sup>63</sup> HRC, ‘[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)’ (21 January 2021) A/HRC/46/54, at [45].

<sup>64</sup> HRC, ‘[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)’ (13 August 2014) A/HRC/27/60, at [13].

<sup>65</sup> *Ibid*, at [132].

<sup>66</sup> Office of the Special Envoy for Syria, ‘[Statement Attributable to the United Nations Special Envoy for Syria on the Anniversary of the Syrian Conflict](#)’ (14 March 2022).

<sup>67</sup> UNSC, ‘[Syria’s ‘Relative Calm’ Not Seized Upon to Build Credible Political Process, Special Envoy Tells Security Council](#)’ SC/15008 29 August 2022.

continues, including amongst non-State armed groups, this is now relatively rare. Recent reports suggest that there has also been a reduction in attacks and airstrikes suffered at the hands of pro-Government forces.<sup>68</sup>

53. **Conflict parties:** In 2014, non-State armed groups continued to engage in sequential realignments and infighting, with fragmentation thwarting “*initiatives to bring them under a unified command with a cohesive structure and a clear strategy.*”<sup>69</sup> It was possible to identify an extremely broad spectrum of armed factions involved in fighting, including, generally, an overlapping mixture of **Syrian moderate nationalists**, **Syrian Islamic armed groups** from a wide Islamic ideological spectrum, **Radical Jihadist groups**, including the two major Al-Qaeda affiliates, Jabhat Al-Nusra, and the Islamic State of Iraq and Al-Sham (ISIS) forces, and **Kurdish armed groups**.<sup>70</sup> However, identifying fixed lines of separation among these ‘factions’ was extremely difficult, given **broad overlaps in ideological orientation and political aspirations**, as well as **continuous individual and collective migration among some groups**.

54. In 2022, the topography of territorial control in the Greater Idlib Area is much clearer. Aside from smaller Islamist groups,<sup>71</sup> and foreign military presences,<sup>72</sup> Hayat Tahrir Al-Sham, or the Organization for the Liberation of the Levant (“HTS”)<sup>73</sup> and its civilian

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<sup>68</sup> HRC, ‘[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)’ (17 August 2022) A/HRC/51/45, at [7].

<sup>69</sup> HRC, ‘[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)’ (12 February 2014) A/HRC/25/65, at [14].

<sup>70</sup> *Ibid*, at [16].

<sup>71</sup> These Islamist groups include Hurras al-Din, an Al Qaeda-linked group that split from HTS in 2018; the Turkistan Islamic Party, a Uighur-Chinese-dominated jihadist militant faction; and smaller Islamist groups, including Ansar al-Tawhid, a splinter of Jabhat al-Nusra – see, European Union Agency for Asylum, ‘[Country Guidance: Syria – Common Analysis and Guidance Note](#)’ (November 2021), 64.

<sup>72</sup> HRC, ‘[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)’ (17 August 2022) A/HRC/51/45, at Annex II.

<sup>73</sup> HTS remains listed as a terrorist entity inter alia by the UN, USA, and EU.

arm, the Syrian Salvation Government “is...the most important and powerful actor in the Idlib area”,<sup>74</sup> controlling “the bulk of the civilian population”<sup>75</sup>, **including the last remaining border crossing at Bab-al-Hawa.**<sup>76</sup>

55. Despite recent factors serving to somewhat weaken its position,<sup>77</sup> HTS remains dominant, its control being such that it “has created several civilian bodies in the territory under its control, including a governance body responsible for civilian functions – the Syrian Salvation Government, a court system that applies Sharia law and an extensive prison system...Third parties have supplemented certain public services, such as international and local NGOs in healthcare, volunteers in education and tribes in administering justice.”<sup>78</sup>
56. **Result:** In 2014, the Syrian conflict was intense, fluid, and fast-moving, meaning that relevant actors could not reliably identify consistent partners for humanitarian access negotiations. In 2022, however, the largely ossified circumstances of the Syrian conflict make legal and safe<sup>79</sup> humanitarian access feasibly possible, whilst the unified

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<sup>74</sup> European Union Agency for Asylum, ‘[Country Guidance: Syria – Common Analysis and Guidance Note](#)’ (November 2021), 142.

<sup>75</sup> UN Syria Commission Chair Paulo Pinheiro, ‘[Independent International Commission of Inquiry on the Syrian Arab Republic](#)’ (29 June 2022).

<sup>76</sup> HRC, ‘[Report of the Independent International Commission of Inquiry on the Syrian Arab Republic](#)’ (17 August 2022) A/HRC/51/45, at Annex II.

<sup>77</sup> In August 2019, the Commission of Inquiry suggested that HTS controlled up to 90% of the Idlib governate. However, this was later eroded somewhat by defections, foreign military presence, and military incursions by Syrian Government forces – European Union Agency for Asylum, ‘[Country Guidance: Syria – Common Analysis and Guidance Note](#)’ (November 2021), 63.

<sup>78</sup> *Ibid*, 64.

<sup>79</sup> It is noted that part of the justification for the Syrian Authorities’ initial refusal of XBHA in 2014 was on the notional basis that it ‘could not ensure the safety of those providing aid in areas outside of its control’. In as far as it was in fact intended as a legitimate excuse in 2014 (which is not clear), this is no longer an appropriate basis on which to refuse such aid, given that the Syrian conflict is no longer of the intensity and scope that it was in 2014 and in light of the legacy of humanitarian access over the 8-years that have passed since 2014. Any such refusal on this basis would therefore be capable of being arbitrary, as prohibited under (customary) provisions of IHL (see further, [ISSUE \(B\): XBHA IN SYRIA IS LEGALLY JUSTIFIED FOR UN AGENCIES AND STATES IN THE ABSENCE OF A UNSC MANDATE](#)).

structure, control, and planning and negotiation capacity,<sup>80</sup> of relevant groups in territorial control ensures that negotiations to ensure such safe access can logistically take place.

57. Indeed, the ossification and organisation of the conflict today is now such that it has and continues to facilitate UN engagement with “*various parties involved to facilitate cross-line operations*” **including those in opposition held territory**, “*to identify an operational modality that is agreeable to all sides and takes into account diverging views, including on who would be involved in conducting cross-line deliveries and who would be authorized to distribute the aid,*” it being expressly noted that those consulted include “*the Government of the Syrian Arab Republic... the Government of Türkiye and local authorities in Idlib*”<sup>81</sup> (emphasis added).
58. **As such, more than ever before, and in direct contrast to the position in 2014, the present facts apparent on the ground in Syria meet with operative legal provisions reviewed below, in that relevant actors are both legally entitled to conduct humanitarian access negotiations with (and rely upon the consent of) non-State groups exercising territorial control in north-west Syria, and, crucially, able to do so by identifying and coordinating with those bodies in a manner that would be (and has been) required even if cross-line aid was implemented as a final replacement to cross-border aid.**<sup>82</sup>

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<sup>80</sup> These factors are highlighted as relevant to the identification of parties to a NIAC (*The Prosecutor v. Haradinaj et al.* IT-04-84-T, Judgment, 03 April 2008, at [60]). The fact that HTS demonstrates these factors more than any other non-State group is perhaps of some relevance in demonstrating the degree to which that group is available for humanitarian access negotiations, over and above the far more loosely defined structures that existed in 2014.

<sup>81</sup> UNSC, ‘[Review of the United Nations Humanitarian Cross-Line and Cross-Border Operations: Report of the Secretary General](#)’ (15 December 2021) S/2021/1030, at [41].

<sup>82</sup> It is noted that in Syria, the ICRC does not support this argument, likely due to its engagement with the Syrian Government – see, e.g., Ellen Policinski, ‘[Just out! ‘Conflict in Syria’, a New Issue of the Review](#)’ (ICRC, 11 April 2019). However, this position, focussed seemingly on the need for operational

## VI. ISSUE (A): XBHA IN SYRIA IS LAWFUL FOR UN AGENCIES AND STATES WITHOUT A UNSC MANDATE

59. Relevant provisions of International Humanitarian Law (“IHL”) permit UN Agencies and States to continue their provision/coordination of cross-border aid in Syria, notwithstanding the absence of an explicit UNSC mandate.
60. IHL does not regulate whether States and/or other relevant Subjects of international law may resort to force; instead, it protects persons who are not participating in conflict by restricting and regulating means/methods of warfare. The fact that operations are carried out under cover of the UN Charter does not change this fact, and IHL thus remains the applicable regulatory/protective framework for any actor engaged in conflict. In this sense, whilst the existence of a Chapter VII mandate, for example, justifies ‘interventionist’ measures designed to further international peace and security, it does not provide a higher level of *legal* protection than that otherwise available in IHL.
61. IHL is found mostly within the four Geneva Conventions of 1949 (“GCs” or “GC”), which are nearly universally agreed and supplemented by the Additional Protocols of 1977 (“APs” or AP”). It applies in two types of armed conflict: International Armed Conflicts (“IACs”), and Non-International Armed Conflicts (“NIACs”).
62. IACs exist when there is a resort to force between two or more States,<sup>83</sup> whilst NIACs exist where a State is fighting against one or more non-State armed groups, or those groups are fighting against each other within one or more States.<sup>84</sup>

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efficiency, does not appear to have been shared in other contexts in which the ICRC operated, such as in Eritrea - see, e.g., [‘ICRC Emergency Appeals’](#) (2015), p.2.

<sup>83</sup> GC I-IV, Article 2(1).

<sup>84</sup> See, ICRC, [‘IHL Casebook: Non-International Armed Conflicts’](#).

63. Albeit more stable than ever before, the Syrian conflict continues to be defined by a multifaceted map of NIACs and IACs.
64. The Syrian State and its allies are presently actively engaged in NIACs with several rebel groups including, *inter alia*: the Syrian Democratic Forces (“SDF”); and HTS, the latter being the group presently in effective control of most, if not all, of the Greater Idlib Area. Parallel NIACs also exist between non-State actors and other armed groups/foreign actors and coalitions operating on Syrian territory.<sup>85</sup>
65. As NIACs, these conflicts are regulated *inter alia* by Article 3(2) common to each GC (“CA 3”), which enunciates the minimum legal provisions regulating NIACs and makes it clear that “*an impartial humanitarian body ... may offer its services to the Parties to the conflict*”. Once offered, consent to that humanitarian relief cannot be refused on arbitrary grounds,<sup>86</sup> such as those that would breach international law,<sup>87</sup> those that go beyond what is absolutely necessary to the achievement of a purported legitimate aim,<sup>88</sup> or those that are “*unreasonable, or...may lead to injustice or to lack of predictability, or that [are] otherwise inappropriate.*”<sup>89</sup>
66. No reference is made in CA 3 as to which ‘party’ (i.e., State or non-State actors) may be the recipient of such an offer. Often, this broad wording thus falls to be interpreted by Article 18(2) of AP II, which suggests that:

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<sup>85</sup> See, for overview, RULAC, ‘[Non-International Armed Conflicts in Syria](#)’ and ‘[International Armed Conflicts in Syria](#)’.

<sup>86</sup> AP I, Article 70.

<sup>87</sup> E.g., causing contributing, or perpetuating starvation in breach may constitute the use of starvation of the civilian population as a method of warfare, thereby breaching Article 54(1) of API and Article 14 of AP II - Akande and Gillard 2016, at [50-51].

<sup>88</sup> Akande and Gillard 2016, at [52].

<sup>89</sup> Akande and Gillard 2016, at [53-54].



*“[i]f the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.” (emphasis added)*

67. It is accepted, then, that should AP II apply to the NIACs in question, it *may* be that the consent of the ‘High Contracting Party concerned’, i.e., the Syrian State, would be necessary for the UN/relevant States to lawfully offer and deliver XBHA.<sup>90</sup> This reflects the continuing focus of Public International Law (“PIL”) (which co-applies and contextualises the application of relevant IHL frameworks)<sup>91</sup> on the relative absolutism of territorial integrity, and is perhaps mirrored in the position taken by the UN Office of Legal Affairs in a 2013 advice (which no State, INGO, or NGO stakeholder canvassed had seen) that:

*“3. As a matter of principle, the United Nations requires the consent of a territorial State in order to carry out operations in the territory of that State.  
[...]*

*4. To the extent that the UN already has the agreement of the Government to conduct operations in Syrian territory, the Organization may continue to*

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<sup>90</sup> Rebecca Barber, ‘Does International Law Permit the Provision of Humanitarian Assistance Without Host State Consent? Territorial Integrity, Necessity and the Determinative Function of the General Assembly’ in TD Gill et al (eds), *Yearbook of International Humanitarian Law 2020* (TMC Asser Press, 2021), 4 (“Barber, 2021”), 4; Akande and Gillard 2016, at [26]; Felix Schwendimann, ‘[The Legal Framework of Humanitarian Access in Armed Conflict](#)’ (2011) 93(884) *International Review of the Red Cross* 993, 1001 (“Schwendimann, 2011”), 1001.

<sup>91</sup> Helen Duffy, ‘[Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication](#)’ (2020) 86 *Grotius Centre Working Paper Series 4*; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, at [25] (“Nuclear Weapons Advisory Opinion”); *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, at [106] (“The Wall Advisory Opinion”).

*conduct such operations, even if they are in areas under the control of the opposition authorities. As a practical matter, it may be that the UN would need also to get the consent of the de facto authorities to conduct operations in areas under their effective control. However, as long as we continue to have the consent of the Government, from a legal point of view, there is no obstacle to the UN continuing its operations in such areas. With regard to any new operations to which the Government has not as yet, consented, Government approval must be obtained before they can be carried out.*<sup>92</sup>

(emphasis added)

68. To be clear, it may be a ‘matter of principle’ in the majority of cases that the consent of the State Party is indeed required to lawfully provide XBHA, AP II having been ratified by 169 States Parties and thus being applicable to any actual or anticipated armed conflicts within those States Parties.<sup>93</sup>
69. **However, this broad statement of principle is not an accurate reflection of the law as it applies in the Syrian conflict, the crucial distinction in this regard being that despite being party to all four GCs and AP I, Syria has elected, in its**

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<sup>92</sup> Extracted in Diakonia International Humanitarian Law Centre, ‘[The United Nations Security Council and Humanitarian Operations in Syria: A Legal Analysis](#)’ (June 2022), 7 (“Diakonia, 2016”). This position broadly echoes that taken in the [General Assembly’s Guiding Principles on Humanitarian Assistance](#), A/RES/46/182, Annex, at [3], which states that “*humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.*” However, these guidelines are neither binding nor Syria specific (having been drafted two decades before the outbreak of the conflict), and state only that consent “*should*” be sought from the affected State, in direct contrast, for example, to the fact that humanitarian assistance “*must*” be provided in accordance with the principles of humanity, neutrality and impartiality. This suggests a distinction (even amongst those most conservative approaches) between disputed and fact specific issues relating to consent in humanitarian relief operations and those cardinal and customary rules of IHL which apply regardless of operational context.

<sup>93</sup> See, ICRC, ‘[Treaties, States Parties and Commentaries](#)’.

sovereign capacity, not to ratify AP II, Article 18(2) of which, contrary to CA 3,<sup>94</sup>  
cannot be said to codify customary international law.<sup>95</sup>

70. Unlike other potentially comparable conflicts, AP II (and its provisions on consent) thus do not apply to the Syrian conflict, and Syria is not bound by, nor entitled to rely upon, the provisions contained in it, leaving CA 3 as the operative provision applicable to XBHA in the present case.
71. Unlike AP II, CA 3 makes no reference to it being necessary to obtain the consent of the High Contracting Party to the NIAC in question (in this case the Syrian State). Its application in this case therefore grants a legal basis by which to obtain consent from non-State actors operative in the Greater Idlib Area, notwithstanding the position taken by the Syrian Authorities.
72. It is accepted that this reading was advanced several years ago by a group of extremely high-profile expert international legal practitioners, even prior to the involvement of the UNSC in the administration of the CBM.<sup>96</sup>
73. At that time, however, its influence was cut short, not only because the immediate need was assuaged by the UNSC CBM mandate soon after, but also because the then disaggregated and fluid topography of territorial control within the Syrian conflict made it all but impossible to identify lines of control (and therefore proper negotiating partners), both within the conflicts between non-State actors themselves and between

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<sup>94</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, [‘Customary International Law, Vol. 1: Rules’](#) (ICRC, 2004), XXXVI.

<sup>95</sup> See, ICRC, [IHL Database – Customary International Law](#); Diakonia International Humanitarian Law Centre, [‘Sources of International Humanitarian Law’](#). Even where it has been acknowledged that provisions of AP II may represent custom, those provisions have not been said to include those relevant to XBHA, see, e.g., *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 02 October 1995, at [117].

<sup>96</sup> The Guardian, [‘There is No Legal Barrier to UN Cross-Border Operations in Syria’](#) (The Guardian, 28 April 2014).

those actors and the Syrian State. At that time, although not a legal one, it may therefore have been that the only practical solution to the implementation of an effective humanitarian aid system was to gain or expressly override the consent of the Syrian State as the only constant in a changing environment.<sup>97</sup>

74. **Now, however, the Syrian conflict is instead characterised by far more ossified areas of territorial control, with identifiable groups with established negotiating structures controlling large swathes of territory in and around the Greater Idlib Area, across conflict lines that have rarely been contested over the last two years.<sup>98</sup> It is these same groups that UN Agencies are engaging, and would be engaging with, to deliver cross-line aid.**

75. Again, therefore, it is stressed that today, more than ever, the operative legal provisions meet with the facts apparent on the ground in Syria, in that relevant actors are both legally entitled to conduct humanitarian access negotiations with and rely upon the consent of non-State groups exercising territorial control in north-west Syria, and, crucially, able to do so by identifying and coordinating with those bodies in a manner that is already occurring and would be required even if cross-line aid was implemented as a final replacement to cross-border aid.<sup>99</sup>

76. It is noted that some oppose the above position on the grounds that CA 3 and IHL more generally should not be used to authorise non-consensual cross-border activity

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<sup>97</sup> It bears stressing that at this time the Syrian Authorities still could not lawfully have arbitrarily denied that aid.

<sup>98</sup> UNSC, '[Press Release: Despite Fragile Calm in Syria, Political Track Has Yielded Few Results, Special Envoy Warns Security Council ahead of Constitutional Committee's Fifth Session](#)' SC/14417, 20 January 2021.

<sup>99</sup> It is noted that in Syria, the ICRC does not support this argument, likely due to its engagement with the Syrian Government – see, e.g., Ellen Policinski, '[Just out! 'Conflict in Syria', a New Issue of the Review](#)' (ICRC, 11 April 2019). However, this position, focussed seemingly on the past need for operational efficiency, does not appear to have been shared in other contexts in which the ICRC operated, such as in Eritrea - see, e.g., '[ICRC Emergency Appeals](#)' (2015), 2.

by third-parties, which are considered by some, including the Syrian Authorities, to represent a contravention of its territorial integrity.

77. However, this position does not preclude the legal merit of those arguments advanced supporting the legality of non-UNSC sanctioned XBHA in Syria.
78. Whilst it is accepted that the fundamental principle of territorial integrity found in PIL continues to apply in situations of armed conflict,<sup>100</sup> those rules must be interpreted in light of (and, in as far as possible, consistently with) relevant rules of IHL, as a matter of *lex specialis*.<sup>101</sup>
79. Taking this into account, the position advanced does not necessarily seek to override the need for consent *per se*; rather, it uses co-applicable principles of (customary-) IHL, as the body of law specifically designed to regulate the conduct of hostilities, to accurately contextualise the otherwise State-centric norms of PIL to situations of armed conflict so as to reach a mutually consistent reading by which group(s) in effective territorial control of area(s) in north-west Syria may consent, without having to seek the approval of the High Contracting Party to the conflict (or, for that matter, the UNSC). This reading therefore reaches mutually acceptable conclusions in respect of all applicable legal norms, in conjunction with the modern approach to the doctrine of *lex specialis*.<sup>102</sup>

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<sup>100</sup> Helen Duffy, '[Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication](#)' (2020) 86 Grotius Centre Working Paper Series 4; Nuclear Weapons Advisory Opinion, at [25]; The Wall Advisory Opinion, at [106].

<sup>101</sup> See, *inter alia*, Alonso Gurmendi, '[The Soleimani Case and the Last Nail in the Lex Specialis Coffin](#)' (13 January 2020, EJIL Talk).

<sup>102</sup> *Ibid.*

80. Outside of these macro-level concerns, related criticisms have been levelled at this argument on the grounds that CA 3 cannot be divorced from AP II, due to the frequency with which they are read together.
81. However, this position is expressly rejected by some of the most authoritative institutional voices on IHL, including the ICRC.<sup>103</sup> Put simply, whilst CA 3 is widely recognised to codify customary international law, AP II (and in particular the provisions on consent contained therein) is not, and thus cannot and should not be seen to obtain that status ‘by osmosis’ because it is similar in substance to the issues addressed by CA 3.
82. This is particularly so in relation to the Syrian State, which, by failing to ratify AP II yet ratifying CA 3, has elected [in its sovereign capacity](#) to remain open to the fact that offers of humanitarian assistance may be made to non-State Parties. In this sense, the absence of an AP II ratification cannot be said to be anything other than an expression of Syria’s sovereign intent to remain free from the entitlements and obligations contained within AP II. The Syrian Government therefore cannot rely upon those provisions now that they may be favourable to it.
83. In a legal sense, therefore, it is entirely possible for third-party State/UN actors to approach those parties to NIACs in existence in the Greater Idlib Area so as to obtain their consent to continue current cross-border operations in and to areas under their control, including through Bab-al-Hawa.
84. Relatedly, it is noted that many arguments against the legality of non-UNSC sanctioned XBHA in Syria advanced on the grounds above rely upon ‘territorial

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<sup>103</sup> See, ICRC, [IHL Database – Customary International Law](#).

integrity' as absolute bars to any cross-border activity in the absence of the consent of the territorial (Syrian) State.

85. For the reasons noted above, this is not the position in IHL; importantly, however, this is also not the position in PIL more generally, as XBHA fulfils neither of the dual elements affirmed by the ICJ as necessary for a 'prohibited intervention' with a State's territorial integrity, namely that of: (a) an interference in the *domaine reserve* of another State; and (b) using coercive measures, up to and including the use of force to do so.<sup>104</sup>

*"[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law...[although]...In the view of the Court, if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering". and "to protect life and health and to ensure respect for the human being"; it must also, and above all. be given without discrimination to all in need in Nicaragua, not merely to the contras and their dependents."*<sup>105</sup>

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<sup>104</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States) (Judgment) [1986] ICJ Rep. 14, at [241] ("Nicaragua"). See also, comments of Prof. Boethe in Diakonia Lebanon Resource Desk for International Humanitarian Law, '[Expert Talk: Cross-Border Humanitarian Operations into Syria – Legal and Operational Aspects](#)' (Beytina – International Law House, 28 August 2020), at [01:18:19-01:19:53]: "sovereignty is a short-hand expression to the sum of powers a State has on its territory and infringements on the right of sovereignty and territorial integrity are prohibited unless they are authorised by international law; so just emphasising sovereignty is really starting the question from the wrong end. The question is [whether] there is a rule of international law which gives a right....of the suffering population to receive relief, regardless of who is the sovereign, and the right of other actors to provide that relief."

<sup>105</sup> *Nicaragua*, at [242]. It is accepted that judgments of the ICJ do not strictly have *stare decisis* value (Statute of the International Court of Justice, Art. 59). However, given its position as the primary legal

86. It is noted that some scholars advancing this argument have been aware of its justificatory limitations for XBHA more generally on the grounds that the:

*“[ICJ] in Nicaragua was concerned with the provision of relief items “at the border to actors operating in country”, as opposed to direct engagement with relief operations inside Nicaragua, and that as such, the judgment should not necessarily be read as permitting the provision of humanitarian relief inside an affected state.”<sup>106</sup>*

87. That said, this challenge may be overcome on the grounds that **the Court’s affirmation of the legality of XBHA was not phrased in terms of where that assistance was to be provided**, in direct contrast with the view taken with regard to US support for contra military operations in Nicaragua, which, in order to be lawful, **were expressly said to have to remain outside of the border, thus suggesting by direct comparison that no such restrictions operate upon strictly humanitarian XBHA.**<sup>107</sup>

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organ of the UN, “it is...not surprising that when it comes to determining what the relevant international law rule is, a decision by the ICJ will today, in general, be treated by the international community as the most authoritative statement on the subject and accepted as the law” – Thomas Buergenthal, ‘Law-making by the ICJ and Other International Courts’ (2009) 103 ASIL 403, 404. This is reflected in the approach of the Court itself which has stated that “to the extent that the decisions contain findings of law, the Court will treat them as all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so” - *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment (2007). No such good reasons exist here, where the examples dealt with by the ICJ in Nicaragua are directly applicable to the instant facts. The ICJ’s findings in Nicaragua are also relied upon by some of the most authoritative voices on the ‘cross-border question’ – see, e.g., Emanuela-Chiara Gillard, ‘[Cross-Border Relief Operations – a Legal Perspective](#)’ OCHA Policy Series, 28-29.

<sup>106</sup> Barber 2021, 9.

<sup>107</sup> Barber 2021, 10.



88. Further, even if this point is conceded, doing so is not fatal to reliance on the judgment in *Nicaragua*, as it would necessarily result in the minimum legal position that assistance “*at the border to actors operating in country*” is agreed to be lawful.
89. For a large part of the Syrian cross-border assistance regime, this is precisely what has happened, and what is happening, the abbreviated logistical position at the border being that UN Agencies and their partners arrange for Turkish trucks to transport their cargo from load points to transshipment hubs in Türkiye, close to Bab al-Hawa, at which point those Agencies arrange for trucks in Syria to collect the cargo from the transshipment hub and deliver it to Syria (see, [THE OPERATIONAL REALITY OF XBHA IN SYRIA](#)). The result is that “[v]irtually no staff has accompanied the goods across the borders” and “[o]perations have essentially been implemented by local partner organisations”<sup>108</sup> in a logistical arrangement that directly mirrors those seen in *Nicaragua*, which were affirmed by the ICJ, the UN’s primary legal organ, to be lawful within the corpus of general international law.<sup>109</sup>
90. **Drawing together the above analyses, it is therefore submitted that the present arrangements at the Syrian border in the north-west are not an intervention of the type prohibited by principle of territorial integrity. Further, and in any case, even it were found that the present operations did contravene ordinary principles of territorial integrity, those principles stand to be interpreted concomitantly with applicable provisions of (customary-) IHL, which permits the continuation of those operations with the consent of the parties in effective control of the relevant territory, including non-State actors.** Accordingly, the

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<sup>108</sup> Diakonia International Humanitarian Law Centre, ‘[The United Nations Security Council and Humanitarian Operations in Syria: A Legal Analysis](#)’ (June 2022), 21.

<sup>109</sup> It is accepted that whether a notional aid provider is an ‘impartial humanitarian body’ will be fact dependent. Whilst clearly *possible* for States (given the Court’s affirmation in *Nicaragua*), it is *certainly* the case that the UN and its Agencies in this context fulfil these requirements.

continuation of XBHA in Syria is not contingent upon and remains lawful in the absence of a UNSC mandate under well accepted principles of international law.

## VII. ISSUE (B): XBHA IN SYRIA IS LEGALLY JUSTIFIED FOR UN AGENCIES AND STATES IN THE ABSENCE OF A UNSC MANDATE

91. In the alternative to the position(s) taken above, even if it is that a UNSC mandate is notionally required to provide a lawful basis for the continuation of XBHA in Syria (which is not accepted) continuing that aid in the absence of such a mandate may nonetheless be legally justified *inter alia* upon the doctrines of distress, necessity, and lawful countermeasures.
92. Under the Laws of State Responsibility reflected in the Draft ILC Articles on State Responsibility (“ARSIWA”) and the Draft ILC Articles on the Responsibilities of International Organisations (“ARIO”), actions leading to a breach of a State or International Organisations’ obligations under international law will be characterised as ‘internationally wrongful’, and will thus be capable of grounding the international responsibility of that State or International Organisation.<sup>110</sup> Such responsibility may also arise where a State/International Organisation provides secondary support to another entity responsible for an internationally wrongful act.<sup>111</sup>
93. Thus, if it is that XBHA without a UNSC mandate is an unlawful interference with Syrian territorial integrity, continuing that aid provision may be *prima facie* capable of being characterised as an internationally wrongful act giving rise to the responsibility of the assisting State/International Organisation.

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<sup>110</sup> ARSIWA, Art. 1; ARIO, Arts. 3-4.

<sup>111</sup> ARSIWA Art. 16.

94. Nonetheless, even if it is accepted that such actions are *prima facie* internationally wrongful, this does not preclude a finding that they are capable of justification on the basis of ‘circumstances precluding wrongfulness’, which:

*“are of general application...[and] [u]nless otherwise provided...apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists.”<sup>112</sup>*

95. Circumstances precluding wrongfulness may be relied upon by both States and International Organisations, including UN Agencies, and include: consent; self-defence; countermeasures; *force majeure*; distress; and necessity.<sup>113</sup>

96. Three of these provide avenues to by which States and/or UN Agencies could deny the effects of the *prima facie* illegality of continued XBHA in Syria, including: necessity; distress; and lawful countermeasures.

### Justifying XBHA on the basis of necessity

97. Per Article 25 ARSIWA (and, *mutatis mutandis*, Article 25 ARIO):

*“1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*

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<sup>112</sup> ARSIWA Commentary, 71.

<sup>113</sup> ARSIWA, Arts. 20-25; ARIO Arts. 20-25.

*(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*

*(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*

*2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*

*(a) the international obligation in question excludes the possibility of invoking necessity; or*

*(b) the State has contributed to the situation of necessity.”*

98. The threshold for a successful plea of necessity in international law is therefore high,<sup>114</sup> and will only be satisfied where a State committing or contributing to an internationally wrongful act establishes that those actions:

- a. were taken to safeguard an ‘essential interest’;
- b. did not seriously impair an essential interest of the party injured by the action;
- c. were not excluded from the potential bases of necessity; and
- d. were undertaken in relation to a situation in respect of which the State acting in breach of its obligations had not contributed toward.

99. In seeking to successfully raise a plea of necessity, the ‘essential interest’ sought to be protected by the otherwise internationally wrongful act can be of the acting State

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<sup>114</sup> *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia) (Judgment) (1997) ICJ Rep. 7, 40.

individually, or of the international community as a whole.<sup>115</sup> **The protection of fundamental rights (particularly the right to life, a peremptory norm)<sup>116</sup> and alleviating civilian suffering fits into both such categories.<sup>117</sup>**

100. It is noted in this regard that there are also no other means by which to safeguard those interests, the position being set out convincingly, including by the UN, that the Syrian Government's demand to provide 'comparable' aid through Damascus will not, and cannot, match the quality and quantity of aid presently ensured by XBHA, which therefore remains the only viable option to keep the peoples of north-west Syria from strife and starvation.
101. In respect of the second 'necessity criterion', that the internationally wrongful act must not seriously impair an essential interest of the injured party (i.e., the Syrian State), even if it is accepted that XBHA interferes, to some extent, with Syria's claim to territorial integrity, strong retorts have been provided to this challenge including, for example, that:

*"[t]here is little question that territorial integrity is an essential interest of States. But while territorial integrity is itself an essential interest, it may be argued that that interest would not be seriously impaired by the targeted provision of lifesaving, [XBHA]. The possibility that some actions might impair an essential interest, but only marginally, was considered by Special Rapporteur on State Responsibility Roberto Ago in 1980. Ago said that while serious assaults on sovereignty could never be justified by a state of necessity, it was possible that circumstances of necessity could preclude the*

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<sup>115</sup> ARSIWA Commentary, Art. 25, 80-84.

<sup>116</sup> CCPR General Comment No. 36, at [2]; CCPR 'General Comment No. 6: Article 6 (Right to Life)' (30 April 1982) HRI/GEN/1/Rev.9, at [1].

<sup>117</sup> See, e.g., ARSIWA Commentary, Art. 25, [14].

*wrongfulness of “less serious” assaults, such as “actions by States in the territory of other States which, ... serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression.”<sup>95</sup> Ago described the common feature of such cases as being “the existence of a grave and imminent danger to the State, to some of its nationals or simply to people, a danger of which the territory of the foreign State in question has a duty to avert by its own action but which its unwillingness or inability to act allows to continue”.<sup>96</sup><sup>118</sup>*

102. Others have been somewhat more circumspect, approaching the issue as such:

*“[h]umanitarian relief operations conducted without consent would impair an essential interest of the state withholding consent: its territorial integrity. While territorial integrity is an “essential interest” of a state, arguably, instances where its violation, in order to conduct humanitarian relief operations, is relatively brief, for example air drops of humanitarian relief supplies, do not impair this essential interest to the serious degree precluded by the principle. However, to the extent that the violation of territorial integrity involves exercising control of territory or contributes to the inability of the state where the operations are conducted to exercise or regain control of territory, such an operation would, arguably, constitute a serious impairment of that state’s essential interests and, therefore, would not be justifiable as a situation of necessity.”<sup>119</sup>*

103. Regardless of how emphatically it is put, there is accordingly a basis on which to claim that despite the essentiality of Syria’s interest in territorial integrity, its ability to

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<sup>118</sup> Barber, 2021, at 13.

<sup>119</sup> Akande and Gillard, 2016, at [148].

repudiate legal justifications for XBHA brought on the grounds of necessity will, ultimately, depend on the facts of the case.<sup>120</sup> In this case, the following factors weigh strongly in favour of States/UN Agencies being able to successfully raise a claim based on necessity here:

- a. first, that the border crossing at Bab-al-Hawa is pre-established and located in Türkiye/rebel held territory, meaning that aid continuing through it unlikely to be confronted with, or catalyse, fighting or use(s) of force incompatible with Article 2(4) of the UN Charter;
- b. second, that establishing/increasing cross-line aid in the absence of XBHA would demand negotiations with the same non-State actors concerned with the provision of XBHA;
- c. transshipment logistics at the Syrian border minimise, if not eradicate, instances in which foreign actors are in fact crossing the Syrian border, in supposed breach of its territorial integrity;
- d. the aid coming through Bab-al-Hawa is well accepted throughout humanitarian circles to be absolutely essential to the survival of the civilian population in Idlib, as set out above, and such essentiality can be proven in relation to numerous specific aspects of cross-border aid, including the delivery of food and medical supplies in specific regions/areas;

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<sup>120</sup> It is accepted in this regard that necessity is a limited exception by which to justify limited actions in response to identifiable factual scenarios. Put differently, *“the case needs to made on implication, for example to say...necessity means that I must bring this consignment of medical goods in to this particular part of the country to respond to this particular need....[this is]... something to bear in mind in terms of how it applies and...more importantly in terms of the legal debate to provide reassurance to the range of actors that are involved [in XBHA]”* – comments of Prof. Chiara-Gillard in Diakonia Lebanon Resource Desk for International Humanitarian Law, ‘[Expert Talk: Cross-Border Humanitarian Operations into Syria – Legal and Operational Aspects](#)’ (Beytina – International Law House, 28 August 2020), at [01:06:18 – 01:06:55].



e. such aid would only continue unless and until The Syrian Government either ceased its arbitrary denial of it or proved, contrary to prevailing voices of the international community, that it could replicate XBHA through cross-line aid, thereby obviating the arbitrariness of demands to switch humanitarian infrastructure to Damascus.<sup>121</sup>

104. Syrian claims to territorial integrity thus pale in comparison to the gravity of the humanitarian need presently satisfied by XBHA, and, in any case, are only marginally infringed (if at all) by the continuation of that aid, which is therefore compatible with legal justifications on the grounds of necessity.

105. Continuing XBHA in Syria thus remains necessary both practically and legally to ensure the lives of those in the Greater Idlib Area, a position that is not changed by the final two necessity criteria given that XBHA is not excluded from the potential bases of necessity, and its continuation in Syria would be a measure designed to remedy the Syrian Government's negligent infliction of conditions likely to cause starvation and strife to its population.

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<sup>121</sup> See, e.g., Reports of International Tribunal Awards, '[Case Concerning the Difference Between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 Between the Two States and which Related to the Problems Arising from the Rainbow Warrior Affair](#)' (30 April 1990) Vol XX, 215, [101, 113].

### Justifying XBHA on the basis of distress

106. Per Article 24 ARSIWA, reliance upon distress as a means by which to justify an otherwise internationally wrongful act requires three criteria to be met.
107. Firstly, the author of the otherwise internationally wrongful act must have no other way to save their own life or the lives of those under their care. In this case, it is accepted that those in the north-west of Syria cannot be said to be under the direct care of the UN/UN Agencies in a 'physical' or 'classic' jurisdictional sense.<sup>122</sup> Further, whilst they may be under the jurisdiction of third-party States operating therein, this is not and will not be the case for the majority of the population there.
108. That being said, the use of the word 'care' does not incorporate, either expressly or by inference, the existence of a requirement(s) of 'jurisdiction'; had the drafters of those Articles wished to do so, they could and would have done, but they did not.<sup>123</sup>
109. It is therefore noted in this regard, that the Syrian conflict is unique not only because of the depth and severity of its destruction and the long-term humanitarian need inflicted by it,<sup>124</sup> but also for the centrality of the role that the UN has carved out for

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<sup>122</sup> See, e.g., jurisdictional considerations under IHL: *López Burgos v. Uruguay*, (Communication No. R.12/52) (29 July 1981) CCPR/C/13/D/52/1979, Supp. No. 40 A/36/40 176, at [12.2-12.3]; *Mohamed Abdullah Saleh Al-Asad v. the Republic of Djibuti* (Communication No. 383/10), African Commission on Human and Peoples' Rights, 55th Ordinary Session for the African Commission (12 May 2014), at [134]; *Jaloud v. The Netherlands*, Application No. 47708/08 (ECtHR, 20 November 2014), at [154]; *Öcalan v. Turkey*, Application No. 46221/99 (ECtHR, 12 May 2005), at [91]; *Issa and Ors v. Turkey*, Application No. 31821/96 (ECtHR, 16 November 2004), at [71]; CCPR 'General Comment No. 35 (Article 9): Liberty and Security of Person' (16 December 2014) CCPR/C/G/35 ("CCPR General Comment No. 35"); *Loizidou v. Turkey* (Preliminary Objections), Application No. 15318/89 (Grand Chamber ECtHR, 23 March 1995), at [62]; *Loizidou v. Turkey* (Judgment), Application No. 15318/89 (Grand Chamber ECtHR, 18 December 1996), at [52-57]; *Cyprus v. Turkey* (Judgment), Application No. 25781/94 (ECtHR, 10 May 2001), at [77]; *Medvedyev and Others v. France* (Judgment), Application No. 3394/03 (Grand Chamber, ECtHR, 29 March 2010), at [67]; *Al-Saadoon and Mufdhi v. The United Kingdom*, Application No. 61498/08 (ECtHR, 2 March 2010), at [128]; The Wall Advisory Opinion, at [112].

<sup>123</sup> ARSIWA Commentary, Art. 24, [7].

<sup>124</sup> United Nations Secretary General, '[Secretary-General's remarks to the Security Council - on the humanitarian situation in Syria \[as delivered\]](#)', (UN.org, 20 June 2022).

itself, *inter alia* through its coordination and facilitation of almost 50,000 cross-border aid trucks to provide assistance to those in need in the north and north-west over the past decade.

110. The centrality of this role is not accidental, and is instead one which has been carefully and purposively carved out by UN Organs, first by taking the unprecedented step to seek a UNSC mandate for cross-border aid, and later by using, renewing, and supplementing this mandate to create a cross-border system upon which millions in north/north-west Syria have now come to rely.
111. As noted above, there is also no legal basis on which to conclude that it was in fact necessary to seek and concretise a UNSC mandated CBM to implement cross-border aid in Syria, to the extent that even nearly a decade after its introduction, the UN Secretary General was only willing to invite UNSC members to renew the CBM mandate by inviting them to “maintain consensus on allowing cross-border operations” (emphasis added)
112. To be sure, the UN’s role in the Syrian conflict and in the provision of life-saving cross-border aid continues to be vital to the survival of the population in north/north-west Syria, and is to be applauded. However, that role must be understood within its context: the UN had not previously used a UNSC mandate to authorise the provision of XBHA, but in Syria, it did. There is also no agreement that the UN was legally required to use the UNSC to provide XBHA, but in Syria, it did.
113. As such, regardless of whether it should have done so (in practice or in law), the reality is that the UN chose to use the UNSC to mandate cross-border aid in Syria, the result being that vast swathes of the Syrian population(s) in north/north-west Syria are now reliant on the aid (system) created and coordinated by the UN, and have had

a legitimate expectation that they will continue to receive and rely upon it fostered through its continuation for nearly a decade.

114. Having placed itself centre stage and created a cross-border aid system that is nothing short of dependent upon the UN's continued involvement, it can in many ways therefore be said that the aid-dependent civilians in the Greater Idlib Area are 'under the care of' or have a 'special relationship of dependence on'<sup>125</sup> it.
115. In respect of the second 'distress criterion', it is understood that the author of the otherwise internationally wrongful act must not be responding to a peril that has been created by them. The present threat to derail the carefully constructed XBHA framework, and the anticipated consequences of doing so, are not the fault of those who are presently facilitating XBHA. Instead, the responsibility for this issue lies squarely upon the Syrian Government's attempts to reinforce an absolute understanding of territorial integrity, without any reference to the strife that these measures will cause. In continuing to provide XBHA, UN Agencies and States cannot therefore be said to be 'responding to a peril that has been created by them'.
116. Finally, a successful plea of distress depends upon the otherwise internationally wrongful act being unlikely to create a comparable or greater peril. For the reasons noted above, the present provision of humanitarian aid through Bab-al-Hawa is keeping much of the north-west of Syria (and beyond) from further humanitarian crises, whilst the re-rerouting of it through Damascus would all but guarantee a fatal worsening of the present situation. Continuing aid through Bab-al-Hawa would therefore ameliorate, rather than worsen, the peril faced by the population in the Greater Idlib Area in a manner thus consistent with the third 'distress criterion'.

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<sup>125</sup> ARSIWA Commentary, Art. 7.

117. Accordingly, even should XBHA be deemed unlawful, the *prima facie* international wrongfulness of it in the present case may be precluded on the grounds of distress.

### Justifying XBHA as lawful countermeasures

118. Reflecting positions taken by leading scholars on the issue,<sup>126</sup> and drawing off an increasingly widespread acceptance regarding the use of countermeasures in response to internationally wrongful acts,<sup>127</sup> XBHA in Syria may also be justified as a 'lawful countermeasure' in light of the Government's failure/refusal to discharge its own international legal obligations. Remarks in the *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* bear quoting extensively in this regard:

*"153. Countermeasures must meet a number of conditions, only some of which warrant highlighting here.<sup>118</sup> First, ordinarily, countermeasures may only be taken by a state or international organisation injured by an internationally wrongful act. Second, the purpose of the countermeasures must be to induce the violating party to comply with its obligations, including the obligation to cease its violation of international law. Third, countermeasures must be proportionate to the injury suffered. Fourth, in the case of international organisations, countermeasures must not be inconsistent with the rules of the organisation, and where the countermeasures are in response to a breach by a member state of*

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<sup>126</sup> See, most notably, Akande and Gillard 2016, at [152].

<sup>127</sup> The increasing willingness to use countermeasures in response to an internationally wrongful act is reflected, for example, in the breadth and depth of the international sanctions' regime imposed on the Russian Federation in response to its unlawful aggressive war in Ukraine, and the widespread willingness to embrace and instrumentalise Magnitsky legislation and its comparable regimes.

*obligations arising under the rules of the organisation, the countermeasures must be provided for by those rules.*<sup>119</sup>

*154. The requirement that countermeasures be taken by a state or international organisation injured by an internationally wrongful act could be met by relying on the increasingly accepted notion of “third party” countermeasures or countermeasures in the collective interest. This is the possibility that States or international organisations may take countermeasures in response to violations of erga omnes obligations, ie obligations owed to the international community as a whole.<sup>120</sup> Since it is accepted that international humanitarian law lays down such erga omnes obligations,<sup>121</sup> States and international organisations not injured by a violation of international humanitarian law, such as the unlawful impeding of humanitarian relief operations, might nonetheless be considered as entitled, at least in principle, to take countermeasures, subject to the other conditions outlined above being met.*

*155. It may be questioned whether humanitarian relief operations conducted without the consent of the relevant state meet the requirement that the purpose of countermeasures must be to induce the violating party to comply with its obligations. In such a case, it is the state or international organisation conducting relief operations without consent that is itself performing the duties not discharged by the party with responsibility for meeting the needs of the civilian population. This notwithstanding, what is important in examining compliance with the requirement under consideration is that the measures must be “taken with a view to procuring the cessation of and reparation for the internationally wrongful act”.<sup>122</sup> Thus, as long as the purpose of the acts is to induce the party unlawfully impeding humanitarian*

operations to cease its breaches of international law, and as long as the operations undertaken without consent are temporary in character, and can and will be stopped once the illegality ceases, the condition being discussed will be met.

156. In addition, even with respect to countermeasures in response to violations of erga omnes obligations, the condition of proportionality must be met. In considering whether the imposition of countermeasures is proportionate, consideration must be given “not only [to] the purely ‘quantitative’ element of the injury suffered, but also ‘qualitative’ factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach”.<sup>123</sup> Furthermore, assessment of proportionality must take into account “the gravity of the internationally wrongful act, and the rights in question”.<sup>124</sup> Since a state’s territorial integrity is an essential attribute of statehood, its breach may only be justified as a countermeasure (even when it occurs without the use of force) in the most extreme cases. For humanitarian relief operations conducted without the consent of the relevant States to be justifiable as countermeasures, it will need to be shown that the unlawful impeding of humanitarian relief operations amounts to a particularly serious breach of international law with severe consequences for those in need of assistance.

157. Countermeasures may not in any circumstance violate the prohibition of the threat or use of force.<sup>125</sup> (emphasis added)

119. This analysis highlights several points of relevance. Firstly, countermeasures must be actioned in response to an internationally wrongful act. Here, there are strong grounds to believe that the Syrian Government’s refusal to consent to XBHA is **arbitrarily**

**maintained** despite the clear humanitarian imperative demanding acceptance, and is thus unlawful within IHL.<sup>128</sup> In threatening the lives of the thousands that continue to rely on that aid in Idlib, there are equally strong grounds to believe that any informed decision to relocate humanitarian aid operations would also interfere with Syria's duties owed to the population of Idlib under IHRL,<sup>129</sup> including those owed under the rights to life and an adequate standard of living, and the rights to health and education.<sup>130</sup>

120. That being said, from the above, it apparently remains the case that even if these measures can be considered internationally wrongful, which they can, lawful countermeasures may only be imposed by third-party States and international organisations only indirectly affected by that act where it amounts to a violation of *erga omnes* obligations.

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<sup>128</sup> It is recalled in this regard that grounds for refusal will be arbitrary when they that would breach international law, including IHRL, go beyond what is absolutely necessary to the achievement of a purported legitimate aim, or are unreasonable, or...may lead to injustice or to lack of predictability, or that [are] otherwise inappropriate (see above). Each of these requirements is satisfied in the instant case.

<sup>129</sup> IHRL co-applies with IHL in situations of armed conflict - Nuclear Weapons Advisory Opinion, at [25].

<sup>130</sup> The right to an adequate standard of living is protected under Article 11(1) of the International Covenant on Economic Social, and Cultural Rights ("ICESCR") (to which Syria is party) and extends to a protection over access to resources "*indispensable for leading a life in human dignity*" including, "*adequate food, clothing and housing, and to the continuous improvement of living conditions*" - CESCR General Comment No. 15, Arts. 11 and 12 of the Covenant (The Right to Water) (20 January 2003) E/C.12/2002/11, at [37] ("CESCR General Comment No. 15"). Whilst this right is phrased primarily as an obligation of progressive realisation (ICESCR, Article 2(1)), this does not obviate the fact that each right in the ICESCR must be guaranteed to some 'minimum essential level', such that "*for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. ... [and] must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations*" - CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1 of the Covenant) (14 December 1990) E/1991/23, at [10]. It is for this reason in relation to the right to water, for example, that: "*there is a strong presumption that retrogressive measures taken in relation to the right to water are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources*" CESCR General Comment No. 15, at [19] (emphasis added).



121. However, this is not fatal to the position advanced, as, even outside of the operative provisions of IHL prohibiting the arbitrary refusal of aid, this requirement may be fulfilled by reference to the (actual or potential) violations of the right to life anticipated by the knowing deprivation of resources necessary for the survival of millions in Idlib (the right to life being guaranteed under the most major international conventions<sup>131</sup> and having attained *jus cogens* and *erga omnes* status in international law).<sup>132</sup>
122. Although the right to life imposes a primarily negative obligation on States to refrain from unlawful killing, it “*cannot properly be understood in a restrictive manner*”<sup>133</sup> and may therefore require States to respect, protect, and fulfil that right, *inter alia* by protecting it and itself refraining from measures that deprive the population of resources indispensable for its survival and, to the greatest extent possible, facilitating and protecting the delivery of those resources. Indeed, it is for this reason that it has been noted that the right to life obliges States to:

*“accept, and probably also...actively facilitate, humanitarian relief if the situation is such that not doing so might threaten the survival of those within their territory or subject to their jurisdiction”*<sup>134</sup> (emphasis added).

123. With this in mind, it is noted that albeit not a total refusal of humanitarian aid, as discussed in detail above, operational realities and past experience strongly suggest

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<sup>131</sup> International Covenant on Civil and Political Rights (adopted 23 March 1976, in force 16 December 1966) 999 UNTS 171, Article 6 (“ICCPR”); Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 04 November 1950, in force 03 December 1953) 213 UNTS 221, Article 2 (“ECHR”); African Charter on Human and Peoples’ Rights (adopted 26 June 1981, in force 21 October 1986) 1520 UNTS 217, Article 4 (“ACHPR”); American Convention on Human Rights (adopted 22 November 1969, in force 18 July 1978) 1144 UNTS 123, Article 4 (“ACHR”); Convention on the Rights of the Child (adopted 20 November 1979, in force 02 September 1990) 1577 UNTS 3, Article 6 (“CRC”).

<sup>132</sup> CCPR, General Comment No. 6, at [1].

<sup>133</sup> CCPR, General Comment No. 6, at [5].

<sup>134</sup> Rebecca Barber, [‘Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law’](#) (2009) 91, 874 *International Review of the Red Cross* 371 (“Barber, 2009”), 392.

that switching humanitarian infrastructure to Damascus would foreseeably, seriously (and intentionally)<sup>135</sup> impact the quality and quantity of aid provision in north and north-west Syria, perpetuating gross humanitarian crises in a manner incompatible with the survival of the peoples there.<sup>136</sup>

124. What is more, even if it is found that withholding consent for cross-border aid is justified *inter alia* in light of the willingness to re-route aid through Damascus and the alleged aim to reinstate Syrian territorial integrity, the impact on humanitarian assistance and the threat to civilian lives caused by it is grossly disproportionate to that aim, arbitrarily and needlessly risking the actual and potential death and suffering of the thousands, if not millions of aid-dependent peoples in Idlib.
125. Again, unless and until Syrian authorities can contradict the vast majority of international voices on this issue to establish that cross-line aid can match (or even get close to) that presently provided across the Syrian border, there is thus a reasonable basis by which to believe that Syria's refusal of aid through Bab-al-Hawa has the potential to be internationally wrongful on account of its arbitrariness and disproportionality, which serves to put it in breach of its obligations under both IHL and, more importantly, *erga omnes* provisions of IHRL capable of justifying

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<sup>135</sup> In this regard, it has been noted that the present situation in Idlib is akin to that seen in the Southern areas of Syria prior to its retaking by Government forces, and that it is therefore instructive to look past the assurances of the Syrian Government that it would permit cross-line humanitarian aid to take into consideration its prior practice of, *inter alia*, withholding aid to punish, or granting aid to reward, strategic areas, weaponising such aid through 'siege warfare' tactics, and profiteering from it – see, Mouayad Albonni *et al.*, '[Damascus' Weaponization of Humanitarian Aid Should be the Focus of Upcoming UN Cross Border Resolution](#)' (Wilson Centre, Viewpoint Series, 08 July 2021).

<sup>136</sup> Even if such aid was not intentionally blocked and/or weaponised, several policy makers and/or scholars in this area have noted the impossibility of matching levels of aid currently being provided through Damascus infrastructure – see Mat Nashed, '[Aid Groups Urge UN to Reauthorise Syria Crossings as Deadline Looms](#)' (Devex, 23 April 2021); Human Rights Watch, '[Syria: Russian Veto Would Shut Down Last Aid Lifeline](#)' (HRW, 10 June 2021); The Soufan Centre, '[IntelBrief: The Point Of No Return? Cross-Border Aid In Syria Under Threat](#)' (The Soufan Centre, 09 July 2021); Human Rights Watch, '[UN Security Council: Restore Syria Cross Border Aid](#)' (HRW, 07 July 2021).

countermeasures imposed by indirectly affected third-parties, such as States and UN Agencies.

126. In respect of the second ‘countermeasures criterion’, i.e., that countermeasures be temporary and remedial in nature, it is accepted that there has been some resistance to the application of the ‘countermeasures paradigm’ to the issue of XBHA, on the basis that:

*“this is not well supported by the current text of the ASR. The ASR define countermeasures as applying only “in the relations between an injured state and the state which has committed the internationally wrongful act”,<sup>69</sup> and the ILC’s commentaries state explicitly that countermeasures do not include “measures taken by a state to ensure compliance with obligations in the general interest as distinct from its own individual interest”.<sup>70</sup> The ILC does reserve judgment on the question of whether international law permits a state or international organisation to “take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest”, however notes that whether or not such measures are permissible, they “do not qualify as countermeasures”.<sup>137</sup>*

127. It has also been questioned whether XBHA can be truly deemed to be a measure intended to induce a State to comply with its humanitarian assistance obligations under IHL/IHRL, given that it instead replaces the non-compliant State’s role in fulfilling these obligations. Nonetheless, there have been cogent defences to these concerns. In particular, regarding the issue of inducement, it has been noted that:

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<sup>137</sup> Barber, 2021, at 12. See also, Reports of International Tribunal Awards, ‘[Case Concerning the Difference Between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 Between the Two States and which Related to the Problems Arising from the Rainbow Warrior Affair](#)’(30 April 1990) Vol XX, 215, [101, 113].

*“the coincidence of the object of a countermeasure and the object of an obligation is not excluded by the law on countermeasures. Important is that the state taking the countermeasure temporarily withholds performance of one or more obligations owed by it to the responsible state (cf commentary (6) to Article 49 of the ILC Articles) with a view to inducing the latter to perform its own obligations to the former or, in this case, the international community at large. These international obligations are not the same, although they may be synallagmatically related: the latter state is obliged to not arbitrarily withhold its consent to humanitarian relief operations, whereas the former is obliged to respect the territorial sovereignty of the latter in the absence of consent to intervene. At the end of the day, the third state’s non-performance of the obligation to respect territorial sovereignty, which is the flipside of its non-consent-based provision of humanitarian relief, is geared towards inducing the territorial state to comply with its obligation not to arbitrarily withhold consent. The third state then only conducts the relief operation until the territorial state consents to it. At this point factually the same operation continues but on another legal basis (norm-compliance rather than countermeasure).”<sup>138</sup>*

128. In addition to these defences, it is further noted in this case that any ‘countermeasures based’ continuation of cross-border aid would, in fact, be remedial and temporary in nature, as it would only seek to remain in place until: (a) the Syrian Authorities accept that they cannot match the quality or quantity of cross-border aid by providing that aid through Damascus and ceases its arbitrary and unlawful refusal to accept that cross-border aid; and/or (b) the Syrian Authorities evidence that such aid can be matched

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<sup>138</sup> Cedric Ryngaert, ‘[Humanitarian Relief Operations as Countermeasures: Overcoming the Withholding of Consent](#)’ (EJIL Talk, 16 December 2016) (“Ryngaert, 2016”).

through Damascus. Continuing with cross-border aid does not therefore replace the Syrian Government's role or responsibilities in aid provision; rather, it simply requires evidence (which is not presently available) that its assumption of those responsibilities will not cause thousands to unlawfully suffer and starve in Idlib.

129. Third, whether or not a notional countermeasure meets the requirement of proportionality will depend on both the scale of the relevant breach(es) and the importance of the interest breached. Given that, for the reasons noted above, the proposed embargo on humanitarian aid through Bab-al-Hawa has the potential to interfere with some of the most fundamental human rights across the whole of north-west Syria (and potentially beyond), there is evidently a basis that this requirement is satisfied by XBHA in the instant case. It bears noting in particular in this regard that **no threat or use of force is being proposed to continue cross-border aid, which will instead be ensured (as it is now) through the instrumentalization of local actors and in agreement with those that have reliably controlled the relevant areas for a significant period of time**. The 'intervention' into Syrian territory, if any, is therefore extremely minimal, yet has the potential to save millions from suffering and starvation, and is therefore evidently proportionate to the aim of ensuring that the Syrian State can, contrary to present projections, ensure proper aid provision through Damascus.
130. As such, **classifying XBHA as lawful countermeasures is a valid basis on which to deny the otherwise *prima facie* international wrongfulness of providing that aid**.

## VIII. ISSUE (C): NGOs CAN CONTINUE TO PROVIDE XBHA UNDER RELEVANT RULES OF PUBLIC INTERNATIONAL LAW

131. As private organisations, NGOs and their staff, unlike States and the UN, are not ‘subjects’ of PIL, and are therefore “*not directly bound by the rules...on sovereignty, territorial integrity and non-interference.*”<sup>139</sup> To some extent, the same is true under IHL, in respect of which:

*“non-Red Cross NGOs do not enjoy international legal personality. A limited regional exception in Europe notwithstanding,<sup>34</sup> and apart from certain humanitarian NGOs with consultative status to the United Nations’ Economic and Social Council,<sup>35</sup> NGOs only have a national legal status in their country of establishment or recognition. Such status does not necessarily need to be recognised by the country in which they operate. It is clear that IHL does not explicitly deal with NGOs, nor provide them with a special legal status.”<sup>140</sup>*

(emphasis added)

132. That said, although not directly addressed by IHL, NGOs delivering exclusively humanitarian aid do enjoy some rights and obligations therein.

133. Per Article 23 of GC IV, for example, States parties to an IAC must “*allow the free passage of all consignments of medical and hospital stores*” intended only for civilians and “*the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.*” Per

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<sup>139</sup> Emanuela Chiara-Gillard, ‘[The Law Regulating Cross-Border Relief Operations](#)’ (2013) 95, International Review of the ICRC, 351, 370 (“Gillard 2013”).

<sup>140</sup> Bruno Demeyere, ‘[Turning the Stranger into a Partner: The Role and Responsibilities of Civil Society in International Humanitarian Law Formulation and Application](#)’ (2006) Program on Humanitarian Policy and Conflict Research Harvard University, 13 (“Demeyere, 2006”). It bears noting in this regard that most NGOs working in north-west Syria are registered domestically (and occasionally internationally) in Türkiye, rather than with the Syrian government.

Article 70(1) of AP I, such parties must also permit the “*rapid and unimpeded passage of all relief consignments, equipment and personnel*”.

134. Whilst the position in NIACs is more complex (there being no such express obligation in AP II, and Syria not being a party to the same anyway), those obligations have been repeatedly,<sup>141</sup> albeit often unsuccessfully,<sup>142</sup> reiterated by UN Organs, including the UNSC, in the Syrian context and beyond.<sup>143</sup>
135. Further, IHL clearly identifies a number of provisions which serve to protect the organisations responsible for delivering humanitarian aid and their staff members.<sup>144</sup>
136. In light of the above, it is apparent that NGOs have several rights and protections within IHL that may be used to deliver humanitarian aid in situations of armed conflict.
137. However, this otherwise positive position must be couched within several further observations, which will be important to any NGOs wishing to engage or continue engaging in XBHA in Syria in the absence of a UNSC mandate.
138. First, all actors in an armed conflict, including NGOs, “*must comply with the relevant rules of IHL if they want their operations and staff to benefit from its protections and*

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<sup>141</sup> In a Presidential Statement of 2013, the UNSC urged the Syrian authorities to expedite the approval of further domestic and international NGOs to engage in humanitarian relief activities, and urged them to promptly facilitate safe and unhindered humanitarian access to people in need through the most effective ways, including across conflict lines and across borders from neighbouring countries in accordance with the UN guiding principles of humanitarian emergency assistance, see UNSC Statement by the President of the Security Council, UN Doc S/PRST/2013/15, 2 October 2013, 3; see also UNSC Resolution 2165, 2, which highlighted that arbitrary withholding consent for the opening of all relevant border crossings for humanitarian aid is a violation of IHL and an act of non-compliance with Resolution 2139 that demanded unhindered humanitarian access.

<sup>142</sup> Articles 70 and 71 AP I. Throughout the conflict, Syria has continually failed to comply with this obligation, by impeding and arbitrarily refusing humanitarian access and objects indispensable for the survival of the civilian population, see, e.g., UNSC Resolution 2139, 2.

<sup>143</sup> See, *inter alia*, UNSC Resolution 688 (1991), UN Doc S/RES/688 (5 April 1991); UNSC Resolution 1265 (1999), UN Doc S/RES/1265 (17 September 1999); UNSC Resolution 1296 (2000), UN Doc S/RES/1296 (19 April 2000); UNSC Resolution 1502 (2003), UN Doc S/RES/1502 (26 August 2003).

<sup>144</sup> See, ICRC, [IHL Database – Customary International Law](#).

*safeguards.*<sup>145</sup> For the reasons noted above, these rules should not be interpreted as making cross-border aid unlawful in the Syrian case. Nonetheless, where NGOs do intervene without the consent of relevant parties, they must be cognisant of the risk that they are doing so without the protection(s) otherwise afforded by IHL.<sup>146</sup>

139. Second, whilst NGOs and their staff are not bound by PIL directly, they may still be liable to proceedings within domestic legal frameworks where they cross borders unlawfully. Whilst such proceedings may amount to mere administrative detention and deportation, it is equally possible that charges may be brought under criminal law which, depending on the jurisdiction, may range “*from illegal entry into the country to the provision of support to the enemy.*”<sup>147</sup>
140. Third, should NGOs and (more importantly) their staff be subject to such proceedings, as domestic rather than international bodies, they would not benefit from the privileges and immunities otherwise ordinarily granted to “*the staff of international organisations ... either on the basis of multilateral treaties like the 1946 Convention on the Privileges and Immunities of the United Nations,*<sup>76</sup> or of bilateral agreements concluded with host States that *inter alia grant immunity from legal processes before domestic court.*”<sup>148</sup>
141. Admittedly, these conclusions are not applicable in all circumstances. Regardless of the issue of consent, for example, NGOs and other humanitarian organisations “*may not...be punished for providing medical assistance, including to wounded enemy combatants.*”<sup>149</sup> However, it is nonetheless important to recognise that NGOs do not

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<sup>145</sup> Gillard 2013, 369.

<sup>146</sup> *Ibid*, 371.

<sup>147</sup> *Ibid*.

<sup>148</sup> *Ibid*.

<sup>149</sup> *Ibid*.



operate in a legal vacuum when engaging in XBHA. When doing so, therefore, they should still seek to identify an operative legal basis upon which XBHA may be said to be permitted and/or justified, on one or more of the bases identified above.

142. Formally, however, it remains true that NGOs are not themselves prevented from engaging in XBHA under international law. Consequently, **NGO led provision of XBHA is not contingent upon the existence and/or renewal of a UNSC mandate, and is instead largely dependent upon the domestic legal arrangements and operational realities in Türkiye and/or north-west Syria.**
143. Of course, whilst NGOs are an indispensable part of any (cross-border) aid operation, the Syrian example considered throughout this document draws out the absolute necessity for coordination in how their responses are targeted and coordinated.<sup>150</sup> In Syria, this role is extraordinarily complex and resource intensive, and poses demands that can only be satisfied by the involvement of major organisations, such as the UN.
144. During consultations with stakeholders in the preparation of this Report, this relationship between States and/or UN Agencies and those actually implementing aid in Syria caused some disquiet, with concerns focussing on whether this relationship could, without giving rise to the individual liability of the implementing NGO partner, still give rise to the *international* responsibility of the State/UN Agency.

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<sup>150</sup> Whilst UN support is irreplaceable and inimitable in Syria, the demand for coordination, with or without UN support, is not unique to the Syrian context – Philippa Web, Rosalyn Higgins, Dapo Akande, Sandesh Sivakumaran, James Sloan, *Oppenheim’s International Law: United Nations* (OUP, 2017), 710. Perhaps chief amongst these examples is the voluntary coordination of NGO activities during the devastating Ethiopian famine of 1984-1985, where the deference of the UN to defences based upon ‘sovereignty’ and the need for ‘consent’ (Ethiopia, unlike Syria, having ratified AP II) led NGO donors to engage in alternative channels to deliver aid directly to the Front-held areas of Eritrea and Tigray through cooperative ‘consortiums’, with such success that from 1984 onwards, there was a division in the international humanitarian response that paralleled the military division within the war zones, meaning that there was an “official aid operation” based in Addis Ababa, accessing affected populations in the government-controlled areas, and an “*unofficial cross-border operation*” channelling relief supplies from Sudan to the Front-held areas – see, e.g., June Rock, ‘[Relief and rehabilitation in Eritrea: lessons and issues](#)’, *Third World Quarterly*, Volume 20, No. 1, 1999, 130.

145. To be clear, the position taken in this Report is that **XBHA in Syria is legal in the absence of a UNSC-mandate, and thus does not give rise to the international responsibility of State/UN actors concerned.**

146. However, even if it was the case that UN Agencies/States were prohibited from directly engaging in XBHA, it has been authoritatively concluded that “[i]f the actors providing indirect support do not enter the territory of the affected state, they do not violate its sovereignty and territorial integrity.”<sup>151</sup> Further, in respect of the principle of non-interference:

*“[w]hatever view is adopted as to the application of the ICJ decision in Military and Paramilitary Activities to “direct” relief operations, it is clear that in the case before it the Court was addressing “indirect” assistance by the provision of relief items from outside the territory of the affected state. The Court concluded that such assistance did not amount to interference provided it complied with humanitarian principles:*

*‘[a]n essential feature of truly humanitarian aid is that it is given “without discrimination” of any kind. In the view of the Court, if the provision of “humanitarian assistance” is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely “to prevent and alleviate human suffering” and “to protect life and health and to ensure respect for the human being”; it must also,*

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<sup>151</sup> It is accepted that this conclusion also stressed the requirement of consent. However, this was put as the position generally rather than being Syria-specific. For the reasons noted above, Government consent is not necessary in the Syrian situation.

*and above all, be given without discrimination to all in need in Nicaragua, not merely to the contras and their dependents.”<sup>152</sup>*

147. The UN’s present cross-border operations are conducted in line with humanitarian principles and on the basis of independent assessments of need as guaranteed by the expansive oversight framework surrounding all cargo trucks coming to and from the Syrian State. Crucially, it also follows a model of ‘remote programming’, in that UN (e.g., UNMM) staff do not accompany goods across the border, which are instead delivered by Syrian drivers, in Syrian trucks, to local NGO partner organisations in Syria. The current UN XBHA delivery mechanism thus emblematises the conclusions above, in that it is indirect support for local third-party actors verifiably acting in accordance with the principles of humanity, neutrality and impartiality, and cannot in any way be said to be internationally wrongful (see, [THE OPERATIONAL REALITY OF XBHA IN SYRIA](#)).
148. Going further, it must also be noted that even if XBHA in Syria was internationally wrongful, which it is not, that hypothetically wrongful act would not be attributable to the UN under international laws of attribution, by which liability for the acts of a notionally private actor (i.e., an NGO providing aid) can be transposed onto a State/International Organisation (i.e., the UN) in certain<sup>153</sup> circumstances.

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<sup>152</sup> Emanuela Chiara-Gillard, ‘[Cross-Border Relief Operations – A Legal Perspective](#)’ (OCHA Policy Series), 36.

<sup>153</sup> Other bases of attribution considered in ARSIWA/ARIO are less relevant. First, acts may be attributable to States or International Organisations where those States or International Organisations are found to have “*aided or assisted in the commission of an internationally wrongful act*” (ARSIWA, Art. 16, ARIO, Art. 14). However, since the actions of NGOs are not regulated by PIL, they are not capable of being ‘internationally wrongful’, rendering this basis of attribution moot - Diakonia, 2016, 26. Second, acts may be attributable where the international wrongfulness of them arises from an actor acting in ‘excess of authority or instructions’ but still ‘in an official capacity and within the functions of the International Organisation’ (ARSIWA, Art. 7; ARIO, Art. 8). Given that there are no instructions given directly to, nor direct official authority conferred upon, third-party implementing partners by UN Agencies, this basis of attribution is generally not troubling. Third, conduct may also be attributable where a State or International Organisation ‘acknowledges or adopts’ it as its own (ARSIWA, Art. 11; ARIO, Art. 9). In order for this basis of attribution to be satisfied, however, the acknowledgment or adoption must be

149. Firstly, the actions of NGOs may give rise to the international responsibility of States or International Organisations where those bodies act under the ‘instructions’ of a State or International Organisation. This will most commonly be the case where the State or International Organisation supplements its own action(s) by “*recruiting private persons or groups who act as ‘auxiliaries’ while remaining outside of the official structure of the State*”, for example by acting as ‘volunteers’ to carry out ‘missions’ for police or military operations.<sup>154</sup>
150. This is vanishingly unlikely to apply to NGOs administering XBHA in Syria as, unless and until a State/UN Agency *directly and specifically instructs or contracts* an NGO to *act on its behalf* in relation to a *specific and identifiable mission* (rather than the State simply lending financial, logical, or coordinative support more generally), this basis of attribution cannot arise.<sup>155</sup>
151. Secondly, and perhaps more complexly,<sup>156</sup> the actions of NGOs may also give rise to the international responsibility of States or International Organisations where they act under the “*direction or control*” of it.<sup>157</sup>

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unequivocal and, crucially, unequivocal in adopting the relevant conduct *as its own*. Given that UN Agencies do not presently adopt the conduct of third-party implementing partners as their own, this is unlikely to be problematical should those Agencies continue to support their partners – they are at best acting indirectly as part of a broader aid operation, rather than adopting the conduct of those partners solely as the actions of the UN. Fourth, in respect of International Organisations, conduct may be attributable where private actors are ‘placed at the disposal’ of those organisations (ARIO, Art. 7). However, this “*is typically the situation where national military contingents are placed at the disposal of the UN by Member States. It is extremely difficult to see how this provision could apply to NGOs conducting humanitarian activities. Consequently, the likelihood of inter-governmental organisations being responsible for the activities of NGOs that they fund is even lower than in the case of States*” - Diakonia, 2016, 26 (emphasis added).

<sup>154</sup> ARSIWA Commentary, 47.

<sup>155</sup> Diakonia, 2016, 26.

<sup>156</sup> ARSIWA Commentary, 47.

<sup>157</sup> *Ibid.*

152. In order to do so, however, the actions of those entities must meet a very high threshold and will only be attributable where the State or International Organisation “*directed or controlled the specific operation and the conduct complained of was an integral part of the operation.*”<sup>158</sup> Indeed, the threshold is so high that it will not even be satisfied where a “*State’s role was ‘preponderant or decisive’ in the financing, organising, training, supplying and equipping of the private actor, the selection of its targets and the planning of the whole of its operations.*”<sup>159</sup>
153. In this light, it is impossible to think of a situation in which this threshold would be satisfied by the financing of and/or logistical support and coordination of NGO operations by States or International Organisations.
154. The principled position therefore remains true that ‘indirect assistance’ does not violate the principle of territorial integrity, as long as those providing indirect assistance “*do not enter the territory of the affected state.*”<sup>160</sup>
155. **In any case, the above considerations do not change the fact that NGO and other private operations are not regulated by, and thus are not liable for acts that would otherwise contravene, PIL.**
156. **Issues of attribution should not therefore be used to preclude the (potential) non-UNSC mandated coordination of the cross-border humanitarian NGO response in Syria, and all channels can and should be pursued to preserve the (UN) multilateral coordinative response which has made cross-border aid so successful in The Greater Idlib Area thus far.**

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<sup>158</sup> *Ibid.*

<sup>159</sup> Diakonia, 2016, 26.

<sup>160</sup> Emanuela Chiara-Gillard, ‘[Cross-Border Relief Operations – A Legal Perspective](#)’ (OCHA Policy Series), 36.

## IX. CONCLUSION

157. The continuation of UN-coordinated XBHA in Syria remains a vital, indispensable, and irreplaceable lifeline for the peoples of north-west Syria, and is supported by elementary, well accepted, and readily applicable provisions of (customary-) international law that serve to regulate the Syrian conflict.
158. Indeed, the legal and humanitarian bases for continuing with XBHA are such that even if it is found that doing so is *prima facie* a breach of international law, which is not accepted, the international wrongfulness of those actions is offset and excused by the international legal doctrine of circumstances precluding wrongfulness.
159. The continuation of UN-coordinated XBHA in Syria without a UNSC mandate is thus not a legal issue, but a political one; whilst arguments based in law will not be resolved in Court, the law stands by as an instrument rather than an obstacle for those willing to use it to advocate for legally sound, humanitarian solutions that prioritise people over politics, and ultimately serve to protect the lives of the millions of Syrians that continue to show resilience in times of unprecedented hardship and uncertainty. Put differently, the issue of continued Syrian XBHA is not whether a sound legal basis *exists*, which it does, rather, it is whether those in positions of power are *willing* to use this basis to continue to provide a lifeline 4.1M aid-dependent peoples in the Greater Idlib Area.
160. ARCS will continue to advocate for this issue over the coming months in collaboration with its strategic partners at G37. For enquiries based on the legal aspects of this report, please contact G37 [here](#). For enquiries based on the humanitarian aspects of this report, please contact ARCS [here](#).



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