



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

Executive Summary and Main Findings

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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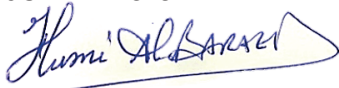
Prologue

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

I. EXECUTIVE SUMMARY

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. **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.***

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

II. MAIN FINDINGS

1. That cross-border humanitarian assistance in Syria in 2022, as it is being conducted today within present conflict dynamics, is lawful for UN Agencies and States without a Security Council mandate under International Humanitarian Law

- Conflicts are regulated by International Humanitarian Law, found mostly within the four Geneva Conventions of 1949, which are nearly universally agreed and supplemented by the two Additional Protocols of 1977. International Humanitarian Law applies in International Armed Conflicts and Non-International Armed Conflicts. Whilst more stable than ever before, the Syrian conflict continues to be defined by a multifaceted map of international and non-international armed conflicts.
- Article 3(2) common to each Geneva Convention enunciates the minimum legal provisions regulating non-international armed conflicts (such as those occurring in Syria) 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.
- No reference is made as to which ‘party’ (i.e., State or non-State actors) may be the recipient of humanitarian relief. Accordingly, Common Article 3 is often interpreted by Article 18(2) of Additional Protocol II, which limits offers of cross-border humanitarian assistance to the ‘High Contracting Party’ concerned (i.e., the Syrian State).
- However, despite ratifying all other relevant Geneva Conventions and Additional Protocols, Syria, **exercising its sovereign powers**, has not ratified and is conspicuously not a party to Additional Protocol II, Article 18(2) of which, contrary to Common Article 3, cannot be said to codify rules of customary international law. Such a conspicuous absence 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 Additional Protocol II, and thus cannot be relied upon by The Syrian Government to preclude the ability **to offer cross-border humanitarian assistance to all parties to the conflict, including, even to the exclusion of the Government, non-State armed groups exercising effective control of, and performing de facto governmental functions in, the north and north-west of the country**. Offers of truly impartial humanitarian assistance to these parties would serve only to protect the human rights of those in territories under their effective control, in accordance with fundamental provisions of International Humanitarian Law and the principles of the UN Charter, without recognising the territorial claims of those groups or the legitimacy of their control therein.

- Whilst this argument **was advanced** prior to the establishment of the present UN mandate by a group of high-profile expert international legal practitioners in 2014, its influence was cut short by the fluid nature of the Syrian conflict, within which the blurred topography of territorial control precluded the identification of reliable negotiating parties. The involvement of the Security Council also drew consensus in a manner that made external legal bases irrelevant (at least in the short term).

- However, the Syrian conflict is now characterised by far more ossified areas of territorial control, with identifiable non-State groups controlling and exercising de facto governmental authority in various areas in north-west Syria, across conflict lines that have rarely been contested over the last two years. UN Agencies presently engage with these groups to provide cross-border humanitarian assistance and would in any case have to continue doing so to provide cross-line aid.

- Thus, **in direct contrast to the situation that pre-existed the UN Mandate in 2014, the operative legal provisions now, in 2022, meet with the facts apparent on the ground in Syria, in that UN Agencies and other relevant actors are legally entitled to rely upon the consent of non-State groups exercising territorial control in north-west Syria**, and, crucially, are able to do so by identifying and coordinating with those bodies with whom they are already required to coordinate. This change has legal implications under international law.

2. **That cross-border humanitarian assistance in Syria is lawful for UN Agencies and States without a Security Council mandate under Public International Law**

- Whilst the fundamental principles of sovereignty and territorial integrity found in Public International Law continue to apply in situations of armed conflict, those rules must be interpreted in light of (and, in as far as possible, consistently with) relevant rules of International Humanitarian Law. The above position thus does not necessarily seek to override the need for consent per se; rather, it uses co-applicable principles of (customary-) International Humanitarian Law, as the body of law specifically designed to regulate the conduct of hostilities, to contextualise more general norms of Public International Law 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 and north-west Syria may consent to cross-border aid, without having to seek the approval of the High Contracting Party (or, for that matter, the Security Council). ***This reading therefore reaches mutually acceptable conclusions in respect of all applicable legal norms.***

• In any event, there is a very strong basis on which to believe that **cross-border humanitarian assistance is not a ‘prohibited intervention’ with a State’s sovereignty**, given the confirmation of the International Court of Justice (the UN’s primary legal organ) (“ICJ”) in *Nicaragua v. United States of America* (1986) ICJ Reports 14, at [242] that where it is given only “*to prevent and alleviate human suffering*” and “*to protect life and health and to ensure respect for the human being*” and without discrimination, “[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.”¹

• The ICJ’s findings strongly support the position that the continued provision of impartial and non-discriminatory cross-border humanitarian assistance thus remains legally justified, not least given the impossibility of replacing that assistance with comparably extensive cross-line frameworks and the continued necessity that assistance in protecting the lives of the millions of aid-dependent peoples in the north and north-west of the country.

• Indeed, **the precedent provided by the Nicaragua judgment is particularly apt given that the present process in Syria does not appear to involve international or non-Syrian actors physically crossing the border into Syria**, and instead relies upon ‘transshipment’, whereby UN Agencies and their partners arrange for Turkish trucks to transport their cargo from load points to transshipment hubs in Turkey, close to Bab al-Hawa, at which point those agencies arrange for trucks in Syria to collect cargo and deliver it to Syria, **in a logistical arrangement that appears to directly mirrors those seen as lawful in the Nicaragua judgment.**

• Drawing together the above analyses, it is therefore submitted that the present arrangements at the Syrian border in the northwest *are not an intervention of the type prohibited by principles of territorial integrity and State sovereignty and are mandated by and fully compliant with applicable principles of (customary) International Humanitarian Law.*

¹It is noted that whether or not States may be a truly impartial humanitarian body is less clear than whether the UN could be, with the latter’s role, especially in Syria, being all but guaranteed to be impartial and humanitarian in nature. The same considerations should apply when assessing the legal justifiability of continued operations under relevant circumstances precluding wrongfulness.

3. In the alternative, that cross-border humanitarian assistance in Syria is Legally Justified for UN Agencies and States in the Absence of a Security Council Mandate

- Even if it is assumed that non-Security Council mandated cross-border humanitarian assistance is an unlawful interference with Syrian sovereignty and territorial integrity, continuing that assistance in the absence of such a mandate may nonetheless be legally justified for UN Agencies under the Laws of State Responsibility reflected in the Draft Articles on State Responsibility and the Draft Articles on the Responsibilities of International Organisations.

- **Firstly, cross-border humanitarian assistance can be legally justified on the basis of ‘necessity’**, on the grounds that it is an action taken to safeguard an ‘essential interest’, that does not ‘seriously’ ‘impair’ an essential interest of the party injured by the action, is not excluded from the potential bases of necessity, and is undertaken in relation to a situation in respect of which the State or organisation (i.e., the UN) acting in breach of its obligations has not contributed toward. Whilst explored in far more detail in the ARCS Report, the following factors weigh strongly in favour of States/UN Agencies being able to successfully raise a claim based on necessity:

- (i) the border crossing of Bab al-Hawa is a pre-established and located in Turkish/rebel held territories, thus it is unlikely to be confronted with fighting or involve or catalyse any use of force.

- (ii) establishing/increasing cross-line, in the absence of cross-border, humanitarian assistance would demand negotiations with the same non-State actions holding territorial control concerned with the provision of cross-border aid.

- (iii) transshipment logistics at the Syrian border minimise, if not eradicate, instances of foreign actors crossing the Syrian border.

- (iv) the assistance coming through Bab al-Hawa is well accepted throughout the humanitarian community as essential to the survival of millions in the Greater Idlib Area as it is irreplaceable in both quality and quantity across conflict lines.

- Secondly, **cross-border humanitarian assistance can be justified on the basis of ‘distress’**, as the party conducting the (allegedly) internationally wrongful act (i.e., the UN) has no other way to save the lives of those Syrians that have been brought under its ‘care’ (a broader formulation than under its ‘jurisdiction’ or ‘effective control’) through its execution and centralisation of control over cross-border humanitarian assistance over the course of the past 8-years, during which time that coordination and facilitation structure has ensured the delivery of almost 50,000 cross-border aid trucks that have provided and continue to provide assistance to those in need in north and north-west Syria in a manner that, though its comprehensiveness, has fostered the increasing dependency of millions upon it: **having created that dependency, the UN and its agencies cannot now simply disengage (even to pursue cross-line aid as an alternative, which does not have the potential to match even a fraction of the quality and quantity of aid coming through the border).**

- Thirdly, **there are equally strong grounds to believe that cross-border humanitarian assistance may also be justified as a ‘lawful countermeasure’** taken by the international community in light of Syria’s failure to discharge its own international legal obligations, namely on the grounds that:

- (i) the ‘countermeasure’ concerned would be the use of continued cross-border humanitarian assistance as a response to the Syrian Government’s arbitrary denial of cross-border aid, that arbitrariness being derived from the fact that its demand for cross-line aid and refusal of cross-border arrangements knowingly, foreseeably, and disproportionately imperils the lives of the millions that continue to rely on that aid in the Greater Idlib Area, in violation of its obligations under both International Humanitarian Law and International Human Rights Law, including, inter alia, the right to life – an erga omnes obligation in which the entire international community has an interest in protecting.

- (ii) those countermeasures (i.e., non-UN mandated cross-border aid) would not be permanent, nor replace the Syrian Government’s primary obligation to its population, and would be temporary and remedial in nature, only remaining in place until such time as Syrian authorities are able to contradict the vast majority of international voices on this issue so as to establish that cross-line aid can match (or even get close to) that presently provided across the Syrian border.

4. **That NGOs can continue to provide cross-border assistance under relevant rules of the Public International Law**

- As private organisations, NGOs and their staff, unlike States and the UN, are not ‘subjects’ of Public International Law, and are therefore “not directly bound by the rules...on sovereignty, territorial integrity and non-interference.” They are also protected by International Humanitarian Law, which serves to protect organisations responsible for delivering humanitarian assistance and their staff members. As such, **NGO-led provision of cross-border humanitarian assistance is not contingent upon the existence and/or renewal of a Security Council mandate, and is instead largely dependent upon the domestic legal arrangements and operational realities in Turkey and/or north-west Syria.**

- **Because impartial humanitarian NGO relief operations in conflicts are not regulated by, and thus do contravene, relevant rules of Public International Law or International Humanitarian Law, the indirect provision of assistance to those bodies by States and international organisations, including by providing them with relief items or funding their operations, does not constitute an internationally wrongful act.**

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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