

The Right to Give and Receive Humanitarian Assistance

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1 Terminology and Evolution of Concept

The term “humanitarian assistance” is today understood as the most prominent activity within the broader concept of “humanitarian action”, the latter ranging from short-term relief to rehabilitation and reconstruction activities and further to development co-operation, often even encompassing measures of disaster preparedness, prevention and risk reduction. Humanitarian assistance activities in the narrower sense are referred to under a number of differing terms such as humanitarian aid, humanitarian relief, relief assistance, relief action, and often address all activities mentioned, excluding development assistance and co-operation. In contrast to the latter, humanitarian assistance is guided by the so-called humanitarian principles of impartiality and neutrality as having their legal basis in Article 70 para. 1 of Additional Protocol I (AP I) and respective customary law, as well as the principle of independence. Notwithstanding differing terminology, “humanitarian assistance” thus comprises providing goods and services essential for the survival of those being directly affected by man-made disasters, including armed conflict, or natural disasters. It may comprise material aid and/or the services of personnel.

Legal rules for humanitarian assistance have been developed in the context of the armed conflicts of the first half of the twentieth century. During these armed conflicts the civilian population suffered widely from the conflicts’ effects. Methods

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of warfare such as blockade and siege in particular during the two World Wars (sometimes referred to as “hunger” or “starvation blockade”) often resulted in dramatic shortcomings in the provision of the civilian population with goods and services essential for their survival, both inside and outside occupied territory. Starvation of the civilian population as a method of warfare had not been prohibited by treaty law until 1977 (Article 54 API), and the existence of a customary principle prior to 1977 is highly debatable. Unlike prisoners of war who were covered by the 1929 Prisoners of War Convention, the civilian population as such did not benefit from any specific treaty regulation of assistance to them. There was thus no legal obligation either to accept relief goods or to grant free passage until 1949.

With a globalizing international community which is less willing to accept humanitarian situations being qualified as domestic affairs within a *domaine réservé*, needs of a population in armed conflict in general, i.e. beyond occupied territory, have become a matter of international concern. The situation of the civilian population in armed conflicts like Nigeria 1966 – 1970, Iraq after the second Gulf War 1991 and under the occupation in 2003, Somalia at the beginning of the 1990s, former Yugoslavia in the 1990s (e.g. the situation in the cities of Vukovar, Sarajevo and Srebrenica), Sudan in the 1990s, Afghanistan before and since 2001, Lebanon 2006, and Gaza/Gaza City 2009 contributed to a broadening of the concept and to the development of a legal regime for humanitarian assistance in armed conflict, under treaty and under customary law. Natural disasters as Hurricane Mitch 1998, the Tsunami of 2004, floods in Myanmar in 2008, earthquakes in Turkey 1999, India 2001, Iran 2003, Pakistan 2005, China 2008 and Haiti 2010 and the international community’s perception of and reaction to these situations have fostered this development.

International law distinguishes between the legal regime for humanitarian assistance in armed conflict and in non-conflict situations. Whereas the legal regime for armed conflict is mainly incorporated into the Geneva Conventions of 1949 and the two Additional Protocols to the Geneva Conventions of 1977, the regime for non-conflict situations is widely dispersed and to be drawn from many different types of instruments, legal and non-legal.

2 The Legal Regime for Humanitarian Assistance in International Armed Conflicts

As such, the term “humanitarian assistance” as used in the framework of armed conflict addresses relief schemes provided to a civilian population – generally from outside. In an armed conflict/in territory under occupation, access to a population lacking the supplies essential for its survival is the precondition for any humanitarian assistance operation.

Concept and legal regime have been broadened with regard to content, scope, and actors involved: Tracing back to the responsibilities of an occupying power, legal regulation of humanitarian action originally had focused on humanitarian assistance provided by States. Both the Fourth Geneva Convention and, in particular,

Additional Protocol I took account of the growing importance of humanitarian assistance provided by non-governmental actors. Furthermore, the rather limited obligation of High Contracting Parties to grant free passage for certain enumerated relief goods has been succeeded by a balanced system of rights and duties of the parties to the conflict (including in relation to their own civilian population; cf. Article 70 AP I and Article 18 AP II), of actors providing humanitarian assistance, and of the receiving civilian population. Finally, a question of highest practical importance is whether the obligation of an occupying power/a party to the conflict to grant access to a population in need has crystallized into a – conditional or unconditional – right to be granted access for any of the actors in humanitarian assistance under customary IHL.

2.1 Humanitarian Assistance Within Occupied Territory

The legal regime for humanitarian assistance in international armed conflict distinguishes between humanitarian assistance provided within occupied territories and in other territories. For both areas it further distinguishes between protection of the operation on the one hand and protection of the personnel involved in the operation on the other hand.

The regime of humanitarian assistance in occupied territory enlarges the obligations of an occupying power deriving from Article 43 Hague Regulations of 1907 to restore and ensure public order and safety.

2.1.1 Protection of the Operation

According to Article 69 para. 1 AP I humanitarian assistance in occupied territory must be humanitarian and provided without adverse distinction. Distinctions are unlawful when based on criteria other than medical or humanitarian. Rights and obligations of different actors are to be distinguished.

Obligations and Rights of the Occupying Power

The occupying power has the obligation to maintain the material living conditions of the population in the occupied territory at a reasonable level. It is particularly obliged to ensure the supplies essential for the survival of the population as well as objects necessary for religious worship (Article 55 para. 1 GC IV, Article 69 para. 1 AP I), including the duty to import such relief goods if the resources of the occupied territory are inadequate. It is further obliged to ensure and maintain, in co-operation with the local authorities, hospital and medical establishments and services, public health and public hygiene (Article 56 GC IV). Both obligations are limited by “the fullest extent of the means available” in order to take account of the factual difficulties which an occupying power may be facing.

In case the population within occupied territory is inadequately supplied with relief goods, the occupying power has the duty to agree to humanitarian assistance

being delivered to this population and, respectively, to grant access to outside actors offering such assistance (Article 59 para. 1 GC IV). It has the complementary obligation to facilitate the delivery by all means at its disposal, as well as to assist the participating relief personnel (Article 59 para. 4 GC IV, Article 71 para. 3 AP I).

The obligations of the occupying power are balanced by certain control rights, especially in terms of verification and supervision, as, e.g. with regard to check of consignments, regulations in terms of times, routes and other practical arrangements (Article 69 para. 2 AP I, Article 59 para. 4 GC IV). It further has the right to approve the participation of personnel in operations (Article 71 para. 1 and para. 4 AP I). The occupying power is prohibited from changing the destination of humanitarian assistance in any way from the purpose for which they are intended, except when this is – ultimately – urgently necessary and in the interests of the population (Article 60 GC IV). Such exceptions are, e.g. prevailing medical needs in a certain geographical area or transport difficulties which cannot be resolved otherwise. As a rule, relief supplies are exempt from charges, taxes or customs duties (Article 61 para. 2 GC IV).

Obligations and Rights of Other States

States other than the occupying power are obliged to permit the free passage of relief goods and to guarantee their protection (Article 59 para. 3 GC IV). Relief consignments are to be respected and protected in case they are exposed to danger through military operations. The obligation to respect and to protect is compensated by control rights in terms of verification and supervision, in particular, a right to check that the assistance is used for the intended population and not for the benefit of the occupying power (Article 59 para. 4 GC IV). States are obligated to permit the transit and transport free of charge (Article 61 para. 3 GC IV).

Actors in Humanitarian Assistance

Article 59 para. 2 GC IV addresses in the first place States and “impartial humanitarian organisations such as the International Committee of the Red Cross” as actors to provide humanitarian assistance. The International Committee of the Red Cross (ICRC) is mentioned both on account of its specific characteristics and as an example whose impartiality is guaranteed. In addition to States and the ICRC, National Societies of the International Red Cross and Red Crescent Movement have the right to pursue their activities – including providing relief – in accordance with the Red Cross principles. Such activities may only be suspended in case of “temporary and exceptional measures imposed for urgent reasons of security” (Article 63 para. 1 GC IV). Finally, other relief societies are permitted to continue their work under similar conditions (Article 63 para. 1 lit. a GC IV), as well as “special organisations of a non-military character for the purpose of ensuring the

living conditions of the civilian population”, as, e.g. organisations of civil defence (Article 63 para. 2 GC IV).

The Civilian Population Within Occupied Territory

The population in occupied territory has a right to receive humanitarian assistance, provided that the conditions are met and that assistance is not impeded by imperative reasons of security (Article 62 GC IV).

2.1.2 Protection of Personnel

Apart from personnel involved in actions under the responsibility of the ICRC who are protected by the emblem of the Red Cross/Red Crescent/Red Crystal – and potentially personnel of National RC/RC Societies, provided they are entitled to protective use of the emblem in specific situations – and, in addition to the specific regulation of Article 142 GC IV, civilian personnel in humanitarian assistance operations enjoy in principle the protection granted by the general rules applicable to civilians of States not party to the conflict. As such and *per se*, personnel participating in humanitarian assistance operations do not enjoy privileges and immunities. However, Article 69 para. 2 and Article 71 para. 1 AP I are generally intended to grant a special status to personnel participating in relief actions. Rights and obligations with regard to such personnel as provided by Article 71 AP I apply to humanitarian assistance operations both within occupied territory and in territory other than occupied. In neither case have subsequent state practice and *opinio iuris* developed an individual legal right for relief workers to carry out a particular task.

In addition to the right of medical personnel of the occupied territory to carry out their duties without interference (Article 56 para. 1 GC IV), Article 71 para. 1 AP I stipulates that relief personnel in general may form part of the humanitarian assistance operations, where necessary. They are required to conduct the operation according to the needs of the population in occupied territory and in an impartial manner. All parties to the conflict have the duty to respect and protect such personnel (Article 71 para. 2 AP I; Rule 32 Customary IHL Study¹). Relief personnel thus are explicitly to be spared and not to be attacked, as well as to be defended, helped and supported by the conflict parties. In case of imperative military necessity the occupying power has the right to limit the personnel’s activities or to temporarily restrict their movements (Article 71 para. 3 AP I), as, for example, in cases where the assistance operation interferes with military operations or where the safety of the personnel is endangered.

Rights of, respect for and protection of relief personnel are limited by the terms of the personnel’s mission (Article 71 para. 4 AP I). Personnel, for example, are

¹Henckaerts and Doswald-Beck (2005).

responsible to ensure that assistance is provided to proper beneficiaries only, that the operation is conducted in an impartial and neutral manner and that sensitive information received during the performance of their activities is kept confidential. They are further obliged to respect the local laws of the occupied territory – as e.g. speed limits – as well as technical requirements imposed by the occupying power – as e.g. route, time-frame, or curfews.

2.2 Humanitarian Assistance in Other than Occupied Territory

The legal regime of humanitarian assistance in occupied territory has prompted regulation for other than occupied territory. In particular, Article 70 AP I distinguishes between rights and obligations of parties to the armed conflict, other States concerned, non-governmental actors in humanitarian assistance and the receiving civilian population involved. Rights and obligations with regard to such personnel as provided by Article 71 AP I apply to humanitarian assistance operations both within occupied territory and in territory other than occupied (cf. above).

2.2.1 The Parties to the Conflict and Other States Concerned

Article 23 GC IV, having been drafted with regard to blockades and being particularly pertinent in “total war” situations, obliges to date all States to allow the free passage of certain goods necessary to the survival of the civilian population. This obligation comprises “consignments of medical and hospital stores”, as well as objects necessary for religious worship intended for the whole of the civilian population other than its own. In particular, essential foodstuffs and clothing are only to be granted free passage in case they are intended for the specifically vulnerable groups of children under fifteen, expectant mothers and maternity cases (Article 23 para. 1). The obligation to grant free passage is subject to the condition that the State concerned is satisfied that there are no serious reasons for fearing that the relief will be diverted from its destination or that, in particular, either the military effort or the economy of the adversary would gain a definite advantage (Article 23 para. 2). The State granting free passage further has the right to technical arrangements for such passage (Article 23 para. 4).

Broader in scope, relief actions for a civilian population which is inadequately supplied have to be undertaken in a certain manner according to Article 70 AP I and Rule 55 Customary IHL Study. Only relief actions which are humanitarian in character enjoy protection; i.e. they must be intended to assist the civilian population in need and not be used for other purposes than providing the civilian population with the essential supplies which it is lacking. The sole purpose of such actions must be to prevent and alleviate human suffering. The need for a relief action and the extent of its urgency must be assessed in every case individually on a factual basis, depending on the actual requirements. Moreover, humanitarian assistance

operations have to be conducted in an impartial manner, i.e. actions need to be guided by humanitarian needs alone. They further have to be conducted without any adverse distinction, in other words, relief actions must not be diverted or provided in a way favouring certain groups or individuals out of political, discriminatory or personal preferences.

The protection accorded by Article 70 AP I is subject to agreement by the receiving State (Article 70 para. 1 AP I; Rule 55 Customary IHL Study). This precondition balances the interests of the civilian population and, as the case may be, of actors providing assistance, with the interest of the receiving State. Once the receiving State has agreed, it is obliged to protect relief actions and to facilitate rapid distribution of items (Article 70 para. 4 AP I; Rule 55 Customary IHL Study). In particular, it has to do its utmost to prevent relief from being diverted, e.g. by looting or corruption.

Legal Obligation to Offer and Provide Assistance

The precondition of consent of the State concerned is the divide in the discussion on a legal obligation to offer and provide assistance. One opinion deduces a legal obligation to undertake relief actions as further defined by the criteria according to Article 70 para. 1 AP I from the wording “relief actions (...) shall be undertaken”,² without specifying an addressee of such obligation. A complementary opinion concludes a “duty for those parties to the Protocols which are in a position to do so to undertake relief actions” from the wording “shall be undertaken” in Article 70 para. 1 AP I.³ Another opinion appears not to accept such duty, based on “an agreement by all concerned” lying “at the root of relief actions”.⁴ State practice to date is not conclusive on a concrete and substantive legal obligation to offer and provide assistance.⁵

Legal Obligation to Accept Offers of Assistance

Again departing from the wording “relief actions (...) shall be undertaken”, a legal obligation to accept relief offers is debated.⁶ This debate argues whether the State concerned is obliged to give the necessary consent in case the civilian population is

²Sandoz et al. (1987), pp. 2795–2796.

³Bothe (2000), pp. 168–174, p. 170.

⁴Dinstein (2000), pp. 77–92.

⁵See the explanations to Rule 55 Customary IHL Study; UN A/RES/46/182 “collective efforts” preamble para. 4; Council Regulation (EC) No 1257/96 Article 6 “Humanitarian aid operations financed by the Community may be implemented either at the request of international or non-governmental agencies and organizations from a Member State or a recipient third country of on the initiative of the Commission”.

⁶Bothe (2000), p. 170; 26th Int’l Conference of the RC / RC Resolution 2 E.(b).

inadequately supplied and the offered assistance is meeting the requirements of Article 70 para. 1. Whereas the first opinion concludes such an obligation to agree emanates from the mandatory nature of Article 70 para. 1 AP I,⁷ the second opinion negates a duty of that kind in reference to the necessary agreement.⁸

All States concerned are obliged to permit and to facilitate rapid and unimpeded passage of goods, equipment and personnel involved in humanitarian assistance operations (Article 70 para. 2, para. 3 lit. c AP I; Rule 55 Customary IHL Study). This obligation is balanced by a number of control rights, parallel to those of an occupying power (cf. above), in particular, the right to prescribe technical arrangements, e.g. times, routes, packaging, or safety instructions (Article 70 para. 3 AP I; Rule 55 Customary IHL Study). In exceptional cases, States concerned also have the right to divert assistance or delay its forwarding in cases of urgent necessity in the interest of the receiving civilian population (Article 70 para. 3 lit. c AP I). The principle of effective international co-ordination as mentioned in Article 70 para. 5 AP I has not gained any legally obliging character, though all three framework pillars of donors of humanitarian assistance – States, the United Nations, and the International Red Cross and Red Crescent Movement – have established internal regulations to ensure effective co-ordination.

2.2.2 Right of the Civilian Population to Receive Assistance

Different from the regime for occupied territory, there is a debate as to whether the civilian population in territory under the control of a conflict party, but other than occupied territory, has a right to receive humanitarian assistance in case it is not adequately provided with supplies essential to its survival according to Article 70 para. 1 AP I. Two major approaches are to be stated. One approach concludes a right to receive from the obligations to undertake relief actions, and, in correlation, to accept relief offers (cf. above).⁹ The 26th International Conference of the Red Cross and Red Crescent in 1995 has “*strongly reasserted* the right of a civilian population in need to benefit from impartial humanitarian relief actions in accordance with international humanitarian law”,¹⁰ as well as “*welcomed* the Code of Conduct for the International Red Cross and Red Crescent and Non-Governmental Organizations (NGOs) in Disaster Relief” which states a “right to receive humanitarian assistance”.¹¹

⁷Bothe (2000), p. 170.

⁸Dinstein (2000).

⁹Plattner (1992), pp. 249–263, p. 250; EC Council Regulation 1257/96 preamble para. 3.

¹⁰26th International Conference of the Red Cross and Red Crescent, 1995, Resolution 2 Protection of the Civilian Population in Period of Armed Conflict, para. A. (h).

¹¹26th International Conference of the Red Cross and Red Crescent, 1995, Resolution 4 Annex VI para. 1.

A differing approach does not accept a “genuine right to obtain” humanitarian assistance.¹² This conclusion is based on the axiomatic requirement of agreement of the receiving State and on an equivalent “host of non-arbitrary and practical reasons that can be invoked” to withhold consent to relief actions being taken.¹³ The most favourable understanding of Article 70 para. 1 AP I which is conceded is one of the provision “precluding refusal of agreement of relief for arbitrary or capricious reasons”.¹⁴

3 The Legal Regime in Non-international Armed Conflicts

The treaty law regime of humanitarian assistance in non-international armed conflicts is weaker than the framework for international conflicts.

3.1 Rights According to Common Article 3 Geneva Conventions

Common Article 3 para. 2 GC – merely – confirms the possibility that “an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict”. The provision identifies not only the governmental, but also the non-state party to the conflict as a potential receiver of such offer and thus of humanitarian assistance. Even an offer or provision of assistance to a non-governmental party to the armed conflict is not to be considered an interference with the domestic affairs of a State. Common Article 3 GC does not provide for any further rights and duties related to humanitarian assistance neither with regard to the operation nor to personnel involved.

3.2 Rights and Obligations Deriving from Additional Protocol II

Additional Protocol II enlarges this regime and confirms the right of “relief societies located in the territory” on which the conflict is taking place to offer their services in order to continue their traditional functions in relation to the victims on all sides of the armed conflict (Article 18 para. 1 AP II), independent of the gravity of the humanitarian situation. Particularly, National Societies of the International Movement of the Red Cross and Red Crescent are addressed as auxiliaries to their public authorities in the humanitarian field.

¹²Dinstein (2000).

¹³Dinstein (2000).

¹⁴Dinstein (2000).

In case the civilian population is inadequately provided with supplies essential to its survival, “relief actions (...) shall be undertaken” (Article 18 para. 2 AP II). Similar to Article 70 para. 1 AP I such assistance has to be humanitarian and impartial and the relief actions conducted without any adverse distinction – the principles of impartiality and non-discrimination being particularly pertinent in the situation of non-international armed conflicts. Again, a precondition for access to a civilian population in need, however, is the consent of the State on whose territory the non-international armed conflict is taking place; a precondition which is reiterated in customary law (Rule 55 Customary IHL Study). In practice and depending on the circumstances, consent of the “receiving” non-state party will be necessary as well.¹⁵

The discussion on potential rights and obligations deriving from this mandatory consent is parallel to the debate in the framework of Article 70 para. 1 AP I and Rule 55 of the Customary IHL Study (cf. above). A conceded conclusion seems to be that “if the survival of the civilian population is threatened, the authorities responsible cannot withhold their consent without good grounds”.¹⁶ It is argued, though, that in the context of non-international armed conflicts “plausible excuses for delaying humanitarian assistance, even for frustrating it altogether”, can “usually” be found.¹⁷

3.3 Customary Law

With regard to the protection of objects used in humanitarian assistance, customary law has broadened the obligations of parties to the non-international armed conflict to respect and protect such objects (Rule 32 Customary IHL Study). Apart from the prohibition of attack – as also provided by the general rules for civilian objects – this prohibition comprises, e.g. the prohibition of destruction, misappropriation and looting of such objects. Parties must refrain from deliberately impeding the delivery of relief objects and from impeding transit of assistance (Rule 55). State practice indicates that the right to control content and delivery of humanitarian assistance, such as search of consignments or technical prescriptions, remains unaffected.

Whereas common Article 3 GC and Additional Protocol II are silent on this matter, customary law has established that parties to a non-international armed conflict are obliged to respect and protect relief personnel (Rule 31 Customary IHL Study). It is prohibited for all parties to a non-international armed conflict to attack – civilian – relief personnel. State practice further indicates that harassment, intimidation and arbitrary detention are also prohibited, as well as mistreatment, physical or psychological violence, murder, beating, abduction, hostage-taking, kidnapping, illegal arrest and detention. Parties must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their

¹⁵Bothe (2000), p. 171.

¹⁶Dinstein (2000); Customary IHL Study 197.

¹⁷Dinstein (2000); Customary IHL Study 197.

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