

Hans-Joachim Heintze
Andrej Zwitter
Editors

International Law and Humanitarian Assistance

A Crosscut
Through Legal Issues
Pertaining to Humanitarianism



Springer

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Abbreviations

AP	Additional Protocol
ASG	Assistant-Secretary-General
BCPR	Bureau for Crisis Prevention and Recovery
CAP	Consolidated Appeals Process
CERF	Central Emergency Response Fund
DG	Director General
DHA	Department of Humanitarian Affairs
DRU	Disaster Reduction Unit
EC	European Community
ECHO	European Community Humanitarian Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EPTA	Expanded Programme of Technical Assistance
ERC	Emergency Relief Coordinator
ERD	Emergency Response Division
EU	European Union
FAO	Food and Agricultural Organization
FRY	Federal Republic of Yugoslavia
GA	General Assembly (of the United Nations)
GC	Geneva Conventions
IASC	Inter-Agency Standing Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDRL	International Disaster Response Law
IFRC	International Federation of the Red Cross and Red Crescent
IHL	International humanitarian law

ILC	International Law Commission
IRO	International Refugee Organization
LRRD	Linking relief, rehabilitation and development
MCDA	Military and Civil Defense Assets
MINURCAT	United Nations Missions in the Central African Republic and Chad
MINUSTAH	United Nations Stabilization Mission in Haiti
MONUC	United Nations Mission in the Democratic Republic of the Congo
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
OCHA	Office for the Coordination of Humanitarian Affairs
ONUSAL	United Nations Observer Mission in El Salvador
PLO	Palestine Liberation Organization
RC/RC	Red Cross/Red Crescent
RTS	Radio-Television Serbia
SC	Security Council (of the United Nations)
SG	Secretary-General (of the United Nations)
SUNFED	Special United Nations Fund for Economic Development
TRNC	Turkish Republic of Northern Cyprus
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNDAC	United Nations Disaster Assessment and Coordination
UNDP	United Nations Development Programme
UNDRO	United Nations Disaster Relief Office
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund
UNIFIL	United Nations Interim Force in Lebanon
UNMIK	United Nations Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMIS	United Nations Mission in the Sudan
UNMIT	United Nations Integrated Mission in Timor-Leste
UNOCI	United Nations Operations in Côte d'Ivoire
UNRRA	United Nations Relief and Rehabilitation Administration
UNRWA	United Nations Relief and Works Agency for Palestine Refugees
US	United States of America
USG	Under-Secretary-General
WCO	World Customs Organization
WFP	World Food Programme

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Introduction

Hans-Joachim Heintze and Andrej Zwitter

The field of Humanitarian Assistance has become increasingly complex in every aspect. Since the end of the cold war one can observe multiple changes – increase in humanitarian action, increased number and variation of humanitarian actors, proliferation of tasks between different actors (e.g. militaries as relief and developmental actors), professionalization of relief aid, etc. Bluntly speaking, the times when the Red Cross and States were the only humanitarian actors and when international humanitarian law alone was sufficiently covering emergency situations, are long gone.

All these developments were accompanied by a slow adaptation of international (humanitarian) and regional law. The fact that the International Federation of the Red Cross and Red Crescent (IFRC) is developing a corpus of cases, legal case studies and legal documents relevant for emergency situations, what is called international disaster response law, shows that a coherent body of law is far from being in existence. The legal reality of international law pertaining to emergency response is rather broadly spread over various international legal fields and related documents. International humanitarian law (IHL) is far from covering the subject of humanitarian aid, beginning with the fact that it covers only armed conflicts and not purely natural disasters.

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1 General Overview

This book is a first attempt to compile a cross-cut over various fields concerning humanitarian aid. As new actors have emerged particularly in the post-cold war order, the first question that will be raised is whether and to what extent non-governmental organizations are covered by IHL. This is the first departure from a classic view on international humanitarian aid. With the end of the power struggle between the East and the West, the United Nations (UN) possibility, corresponding to its responsibility as a humanitarian actor, emerged to actually engage more actively in the field of disaster response. It picked up and further developed its role as actor and coordinator of disaster response thereby developing an impressive body of laws, resolutions and declarations, establishing new organs and creating new frameworks all dealing with humanitarian aid. Next to the UN the European Union (EU), a regional actor, found its way into the field of humanitarian action. Apart from being the second biggest donor, next to the United States (US), it became itself active as an actor and coordinator of relief aid. The end of the Cold War marked also the beginning of peace-keeping in a large and professional manner. However, as peace-keeping is a task of states and international organizations bound by human rights law, the question immediately arises whether peacekeepers are allowed to ignore human suffering or, put differently, whether peacekeeping must involve humanitarian aid, deriving from its responsibility to ensure human rights. Also international refugee law plays a role in humanitarian aid as most emergencies that require international aid are accompanied with large scale movements of people. According to the fundamental principle of humanity, underlying all work of humanitarian actors, the needs of people are at the centre of concern. In the event of natural disaster, people lack a right to protection by the international community. This issue is currently being dealt with in the International Law Commission (ILC). A look into current developments and the future of the right to humanitarian assistance are therefore necessary elements to be considered.

2 Detailed Chapter Overview

2.1 *Spieker: The Right to Give and Receive Humanitarian Assistance*

This first chapter begins with introducing into the terminology and evolution of concept of the right to give and receive humanitarian assistance. It will sketch the legal regime for humanitarian assistance in international armed conflicts within occupied territory specifically regarding:

1. Obligations and rights of the occupying power
2. Obligations and rights of other states
3. Actors in humanitarian assistance

This is being complemented with a discussion on the right to access persons in need. Finally this chapter sheds light on the right to give and receive access in non-conflict emergencies.

2.2 Mackintosh: Beyond the Red Cross: The Protection of Independent Humanitarian Organizations and Their Staff in International Humanitarian Law

Members of independent humanitarian organizations have less protection, legally speaking, than most of them probably think. Two key features of their work – their neutrality and independence – as well as practical steps they take to implement these principles, actually place them outside much of the protection afforded to either civilians or authorized medical staff. This chapter examines the international legal protection currently available to independent humanitarian organizations, and considers whether there is scope for improvement of both the content of this framework and respect for the same.

2.3 Zwitter: United Nations' Legal Framework of Humanitarian Assistance

Since the end of the cold war the United Nations System in regard to Humanitarian Assistance developed at an incredible speed. Numerous resolutions of the Security Council, the General Assembly and the Economic and Social Council have been adopted and specialized bodies like the Office for the Coordination of Humanitarian Affairs have been established. Though this forest of humanitarian-related norms within this system is constantly developing, two landmark resolutions of the General Assembly are of major importance: (1) An Agenda for Peace (A/RES/47/120[B]) and (2) Strengthening of the coordination of humanitarian emergency assistance of the United Nations (A/RES/46/182). While resolution 47/120 further developed the concept and the UN strategy of humanitarian assistance, the latter resolution took concrete action by creating the position of the Emergency Relief Coordinator and the Inter-Agency Standing Committee. These resolutions prepared the ground for the internationally coordinated humanitarian action we know today.

This chapter aims, firstly, to summarize the history of the UN humanitarian assistance system and, secondly, to give an overview on how this system works nowadays. It will furthermore elaborate on the rules regarding safety and protection of humanitarian personnel and conclude with the privileges and immunities of the UN and of specialized agencies.

2.4 Broberg: Legal Basis of EU Council Regulation 1257/96 Concerning Humanitarian Aid: Time for Revision?

This fourth chapter will examine the workings of the EU's legal regulation of its provision of humanitarian aid. Focus will be upon Regulation 1257/96 on Humanitarian Aid. Hence, the chapter will look at the regulation's legal basis (Title XX of the EC Treaty), scope, objectives and specific workings. Particular attention will be given to the general principles (neutrality, non-discrimination, impartiality, etc.) and to the EU's cooperation with international organisations. Due account will also be taken of the European Consensus of Humanitarian Aid [COM(2007) 317 final] as well as of the Principles and Good Practice of Humanitarian Donorship (Stockholm 2003) as guides for EU humanitarian aid. Finally, provided that the Treaty of Lisbon gains momentum anew, the chapter will consider the consequences of the Article 214 of the Treaty – whereby for the first time humanitarian aid will be covered by the Treaty itself.

2.5 Maus: Human Rights in UN Peace-Keeping Missions: A Framework for Humanitarian Obligations?

When countries emerge from armed conflict, the need for humanitarian action to provide essential goods to the population does not cease. With the increasing role of UN peace-keeping missions in post-conflict situations, the question of their responsibility to care for vital needs such as food, health and shelter for the population is of utmost importance. With regard to legal rules, international humanitarian law, which serves as a fundamental source of rights and obligations during armed conflict, is only applicable to a very limited extent in these situations. Instead, the search for a legal framework regulating post-conflict protection and provision of the population leads to human rights law. Here, particularly economic, social and cultural rights can serve as guidance concerning the obligations of UN peace-keeping missions.

The chapter aims at evaluating to what extent human rights play a role in UN peace-keeping missions within the presented context. After (1) giving a short overview on the relationship between human rights and humanitarian action, the chapter will (2) analyse in how far such missions are bound by human rights obligations arising from conventional and customary law. In the main part, it will (3) focus on human rights duties explicitly laid down in some exemplary mandates of peace-keeping missions. In the remainder, the chapter will (4) analyse to what extent other aspects in the mandates, e.g. specific tasks of the mission, create implicit human rights obligations.

2.6 *Heintze: Human Rights and International Humanitarian Law*

The prevention of forced displacement has become a key topic of international humanitarian law (IHL) and of refugee law. Against the background of “ethnic cleansing” in the Balkans and recently in Africa this chapter will deal with the lack of adequate theoretical analysis and the weakness of legal regulation. The right to return is part of international peace agreements, however has this right been implemented in practice? Therefore the prevention of forced displacement is necessary and an obligation of the international community. International criminal courts have dealt with cases of displacement. The chapter will analyze the relationship between the human rights aspect, the IHL and refugee law approach. Furthermore, it will examine the challenges and hazards entailed by the emergence of this concept, which appear to be both multidimensional in its objective and application and controversial in terms of its potential impact on certain norms and principles of international law.

2.7 *Patnaik: Protection of Individuals in the Event of Disasters: Quest for an International Legal Framework*

This chapter builds on the International Law Commission’s initiative for an international legal framework for the Protection of Individuals in the Event of Disasters, with reference to natural disasters. That humanitarian assistance is the responsibility of the recipient State is indisputable as Governments derive their rights and duties from individuals. This also raises the question whether there is a right of initiative for States, International Organizations and non-State actors in offering assistance. Here again, it is essential to emphasize the primary role of the affected State as international assistance to persons within its territory, as part of international solidarity and cooperation, takes place with its consent and under its supervision. The issue of humanitarian assistance encapsulates a legal, political and moral conundrum. Nonetheless, there exists a responsibility to render assistance for protection of individuals during disasters. However, there is no provision to deal with such a situation when a State refuses cooperation and the Government, International Organizations and NGOs cannot ignore this. This situation opens up a new dimension in the scope of humanitarian intervention for the sake of rendering assistance.

It is expected that we proceed on the new initiative for a comprehensive multi-lateral legal framework to arrive at the following objectives to understand: (a) the causes of humanitarian crisis/natural disasters and shape our responses accordingly and (b) the functional interdependence between protection of individuals, their human rights and international responsibility. Further, this chapter will focus on principles of international disaster relief, characteristics of humanitarian assistance and examine if humanitarian assistance is part of customary international law.

The Right to Give and Receive Humanitarian Assistance

Heike Spieker

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 AP I), 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