CHAPTER 21

Currently Existing Gaps in the Law

1 Law Governing Humanitarian Relief

1.1 *No Comprehensive Legal Act*

The existing regulations for non-international armed conflicts in Common Article 3 and AP II are limited, and within those regulations there is very little dedicated to the provision of humanitarian relief and access to civilians in need. Most of the regulations which are required for the provision of relief have therefore to be derived from (unwritten) customary law of IHL and other legal sources. The absence of a comprehensive written legal act with all the relevant rules for the provision of humanitarian relief in non-international armed conflicts leads in the practice to a lack of comprehensive understanding of the existing rules. Such an understanding is particularly important for the conflict parties.

Even though armed forces of States and armed groups may have (at best) internal guidance and military manuals which also include regulations on relief operations, such regulations will be limited to certain provisions and will in general refer only (as they are made for the guidance of the behaviour of the respective actor) to the duties of the respective actor with regard to humanitarian relief. Thus, unmentioned are the rights and obligations of other actors involved in the relief. But in order to assess a situation correctly and react to it, a comprehensive picture of the rights and duties is required. These regulations will also not differentiate between international and non-international armed conflicts. It is therefore not enough when regulations on humanitarian relief are captured in internal regulations of the conflict party. It is rather required and in the interest of all actors involved in humanitarian relief, that there is a comprehensive written legal act on humanitarian relief, including the particularities of situations of non-international armed conflict. A set of all relevant rules for humanitarian relief would also be better accessible for the civilian population, which often has neither the required resources nor the knowledge to access different sources in order to understand their rights and duties with regard to humanitarian relief.

1.2 *Uncertainty about Applicability of IHL Regulations*

In order to apply the regulations on relief actions in non-international armed conflicts, it is required that there is certainty about the existence of

a non-international armed conflict. Affected States, however, are commonly reluctant to acknowledge that there is a non-international armed conflict on their territory.[1] During the drafting of AP II, it was emphasised by several States (based on the prevalent opinion at that time that non-international armed conflicts are internal affairs of the affected State) that it is solely a matter of the State which is affected by an armed conflict to decide whether the conditions for the applicability of the Protocol are fulfilled or not.[2] Even though today non-international armed conflicts are not anymore considered as purely internal affairs which exclude the opinion of the international community, the view of the affected State on whether there is an armed conflict on its territory or not is generally respected by the international community. This is also comprehensible, since such an assessment also requires knowledge about the factual circumstances in the country, which only the affected States will have, in contrast to the international community. But practice proves that in situations where international treaty monitoring or judicial bodies were called to make an independent assessment or decision on whether there was an ongoing armed conflict or not, those bodies have often come to a conclusion which was contrary to the view of the affected State. This shows that the decision on when the rules on non-international armed conflict are applicable should not be left purely to the discretion of the affected State. At the same time, to wait until an international treaty monitoring or judicial body makes an independent assessment will also delay the decision whether IHL is applicable.[3] The online portal 'Rule of Law in Armed Conflicts (RULAC)' project of the Geneva Academy of International Humanitarian Law and Human Rights tries to fill this gap by providing an independent and impartial classification of armed conflicts in the world, based on open source information, in a format that is accessible to a wide audience. Even though RULAC is used as legal reference by a broad audience, including legal experts, government officials, international organisations or NGOs,[4] its classification is non-binding for the concerned States. The absence of an international entity competent to make binding determinations on an ongoing internal armed conflict has been therefore often raised in the doctrine as an obstacle to the effective application of the relevant norms of non-international armed conflict.[5]

1 See on this ICRC, Improving Compliance with International Humanitarian Law, p. 20 f.; BANGERTER, p. 357; on the overall topic, see HEFFES/FRENKEL, p. 54.

2 ZEGVELD, Accountability, p. 12.

3 ZEGVELD, Accountability, p. 12 with further references.

4 See in this regard their website http://www.rulac.org/about (last visited 31 August 2023).

5 ZEGVELD, Accountability, p. 12 with further references.

1.3 *Uncertainty of the Content of the Regulations*

Another obstacle which may hinder the effective application of the existing regulations on relief operations during non-international armed conflicts may be the uncertainty about the content of the regulations. Certain issues which concern the provision of humanitarian assistance have not yet achieved consensus in the doctrine and practice. Particularly the requirement of consent is in many respects still uncertain, like for example whether the consent of the affected State is required if relief is to be provided in territory which is under the control of the armed group, or if it is to be proceeded in situations of failed State, whether, and if so when, consent may indeed be presumed because there is not a functioning government.[6]

The Geneva Conventions and the APs thereto, in contrast to other international law treaties, do not provide a treaty body where States Parties can meet on a regular basis in order to discuss the implementation of the regulations of these treaties. Questions on IHL are only taken up when there is a situation of emergency and discussed in ad hoc conferences, where there is a lack of expertise and time to engage in qualified examination.[7] Another option to clarify uncertain provisions in IHL is when they are addressed in a procedure before an international court or tribunal. However, such a process will take time and the decision might not answer to all the uncertain aspects of a regulation. Thus, as long as uncertain legal aspects are not addressed because of urgent circumstances in an international conference or are addressed before an international court or tribunal, legal questions with regard to IHL will remain unresolved. And even if they are addressed, it is questionable if they would provide satisfying answers with the required expertise and depth. It must therefore be concluded that the existing instruments for clarifying questions with regard to the uncertain contents of IHL regulations are insufficient in view of a legal body such as IHL, which is applied to situations which are fast changing and faces constantly new challenges.

1.4 *Absence of Regulations on Arbitrary Withholding of Consent*

In addition to the uncertainty about existing regulations, there is further the problem of absence of regulations on the problematic of withholding of consent. Arbitrary withholding of consent is not addressed in any of the existing legal regulations which are applicable to the provision of humanitarian relief. Even though there is general acceptance that consent to relief actions should

6 Van den Herik/Jägers/Werner, CAVV Advisory Report, p. 25.

7 On the whole, Pejic, p. 318.

not be withheld arbitrarily, and has been addressed by several resolutions of the General Assembly and the Security Council, it is required that the issue of withholding of consent is also addressed in an international treaty in order to create legal certainty. It should provide a legally binding definition and criteria on what amounts to arbitrariness and situations where withholding of consent to relief must be considered as arbitrary. It further also requires a section on what the consequences of arbitrary withholding are and what kind of actions can be taken by the actors affected by the arbitrary withholding of consent to relief.

1.5 *Difficult to Identify Arbitrariness*

In order to decide if a remedy can and should be taken in response to a withholding of consent to relief, it is necessary to establish that the withholding is effectively arbitrary. Even if legal regulations would provide criteria for determining arbitrariness, it is similar to the situation of armed conflict that for a proper decision an inside view of the factual circumstances is required. This task, however, cannot be fulfilled by the conflict party which is withholding the consent, nor by the opposing party, since they will not be able to make a neutral assessment. Since reactions to arbitrary withholding of consent have to be taken as quickly as possible in view of the need of the civilians for relief, assessment of arbitrariness cannot be taken on the path of judicial claims. The current situation therefore calls (similarly to the assessment of a non-international armed conflict) that an independent entity should be capable of deciding, at the moment when the consent to relief action is withheld, whether the consent is withheld by the conflict party arbitrarily or not.[8]

In view of the amount of relief action which is offered to a State in a humanitarian crisis, it is questionable how such an assessment could be realistically put in place. It is also doubtful if the concerned conflict parties would allow such an interference and accept an assessment by the international body as a binding decision. These challenges will be discussed in depth later. It is however important to note that even if an independent entity may assess a withholding of consent to relief as arbitrary, this would not lead to a right for the humanitarian actors to provide relief. Provision of relief will continue to require the consent of the conflict party.

8 Van den Herik/Jägers/Werner, cavv Advisory Report, p. 26.

2 Legal Status of Non-state Armed Groups

2.1 *Uncertainty about Adherence to International Law*

Even though it is generally agreed that armed groups, as parties to an armed conflict, have to respect IHL and IHRL, there is, however, little clarity on what their rights and duties are, particularly in the context of humanitarian relief. With one exception, legal regulations do not address armed groups in general. It is therefore welcomed if armed groups incorporate international obligations in their own manuals, codes of conduct or declarations and show in doing so explicitly that they are willing to respect certain obligations. However, this should not give the false impression that armed groups are only bound by the obligations they mention in their internal rules; in other words, just because they do not contain a specific obligation does not mean that armed groups are not nevertheless bound by it under international law. The existing uncertainty regarding the adherence of armed groups to international law is unsatisfying: on the one hand for the concerned armed groups, since they cannot anticipate possible consequences of their behaviour; on the other hand also for the international community, in order to determine whether armed groups are bound by a certain rule or not, and consequently when they breach that obligation.

It is encouraging to note, that in the last decades there were discussions in the doctrine about the obligations of armed groups under IHL and IHRL. However, not mentioned within these discussions were possible rights for armed groups in return to the duties imposed on them. Even though the hesitation and restraint of the international community on this issue is comprehensible, since these groups are also not legally accepted entities, it is however not practicable to expect armed groups to respect obligations without granting them any rights in return. For regulations in the context of armed conflicts to be effective and respected by armed groups, they must be realistic and should not undermine the capability of the armed groups to keep their military position. It is therefore indispensable that armed groups also enjoy certain rights in return for the obligations they have to respect. It has been shown before what rights armed groups may have with regard to their obligations in the context of humanitarian relief. Thus, in order to enable a better respect of the law, it is necessary that this understanding is also acknowledged under international law. Further, with regard to their binding by international law and their existence as an independent entity that has reached to a certain degree of organisational and functional capacity, it is also not legally consistent that they are not acknowledged as subjects of international law.

2.2 *Exclusion from the Law-Making Process*

It is undisputed that for a better implementation and respect of the law by armed groups, their awareness and ownership of legal obligations must be strengthened. This inevitably requires that non-State armed groups are also involved in the interpretation and implementation of existing rules, as well as in the creation of new legal regulations. Armed groups,however, are excluded from the law-making process. They can neither become parties to international treaties, nor are their practices considered as "State practice" for the establishment of customary law. They are also not invited to drafting processes or international conferences where implementation of the law is discussed.[9] Consequently, they will not feel committed to international norms in the same way as States.[10]

The exclusion of armed groups from international treaties is comprehensible, since armed groups do not enjoy the same legal personality as States or international organisations in order to become a party of an international treaty. Further, in view of the existing number of armed groups, it would also be difficult to include all armed groups or to make a choice which group should be included in the treaty process. The more actors are involved in treaties, the more difficult it is also to find a consensus. An exclusion of armed groups can therefore also be justified on the basis of the effectiveness of a treaty process.

However, the exclusion of armed groups from the development process of customary law, treaty drafting or international conferences is not justifiable with the missing legal equality to States or the number of armed groups. By contrast, because of their number, they should be heard. Customary law and international conferences enable to take note of the existing opinion and how law is perceived by them. These are important aspects for the evolvement of international law, particularly in view of the increasing number of armed groups, their opinion, particularly on IHL and, in this context, also with regard to the regulations within IHL on humanitarian assistance, is important for their application. It is here important to note that involving armed groups in such processes does not presume any legality of their status. What has been said by HOFMANN/SCHNECKENE on the necessity for engaging with armed groups in state- and peacebuilding can also be applied for the involvement of armed groups in the law-making process:

9 SAUL, p. 41.
10 SAUL, p. 41.

> Non-state armed actors are part of the problem in today's conflicts as much as they must sometimes be part of the solution.[11]

Involving the perception of non-State armed groups is necessary for improving the existing legal regime on humanitarian access. Ways and means have to be found that their involvement is accepted by States and not feared as a possible legalisation of the armed group.

2.3 *Absence of Direct Responsibility of Non-state Armed Groups*

While non-State armed groups must respect provisions of IHL and IHRL, the mechanisms for holding them accountable for violations of these provisions are less developed than those for States. There are particularly no regulations on the responsibility of armed groups similar to those in the ILC Draft Articles on State Responsibility. After the drafting of the ILC Articles, this was also criticised in the doctrine, which stated that in view of the contemporary problems "where all sorts of different non-State actors evolve at domestic and international levels a system of responsibility based entirely on State-centric paradigm" may fall short of dealing with violations of such actors.[12] That armed groups are independent entities with the capacity to be considered as subjects of international law has been shown in the discussion on binding them to customary IHL and IHRL. It is therefore legally only consistent to hold a subject with rights and duties also responsible under international law.

It can be argued that at least members of the armed groups can be held accountable for international crimes. But breaches of IHL or IHRL which do not constitute a crime according to the Rome Statute remain unpunished in the existing legal system. It is also important that non-State armed groups as an entity can be held internationally responsible. BELLAL, for example, argues in this regard that calling on armed groups collectively to change their behaviour, instead of punishing their respective members, could enable a better implementation of international law, as this would motivate them more to develop trainings and structures in order to prevent further similar breaches.[13] She further underlines that without a collective responsibility of armed groups, members of an armed group may be held judicially responsible, while the group

11 HOFFMANN/SCHNECKENE, p. 3.

12 DUDAI, p. 785; on the overall topic, see BELLAL, Direct Responsibility, p. 304 f. with further references.

13 BELLAL, Direct Responsibility, p. 305; for similar argumentation see also ZEGVELD, Accountability, p. 133; HEFFES/FRENKEL, p. 55, with further references; SASSÒLI, 'Taking Armed Groups Seriously', p. 10.

which may have incited the individual to commit that crime may remain unpunished.[14] This situation is unsatisfactory. As mentioned before, in order to be effective, every legal regime has to provide for consequences for all who are responsible for violations of the rules it seeks to promote.[15] This opinion is also shared by ZEGVELD, who points out that:

> [t]he acts that are labelled as international crimes find their basis in the collectivity. […] Therefore, the most challenging level of accountability is the accountability of armed opposition groups as such.[16]

Today, we have only the possibility of certain international monitoring and ad hoc fact-finding commissions and mechanisms where breaches of armed groups can be determined and, at best, sanctions can be imposed. But these are not judicial procedures; their goal is to change the behaviour of the armed groups, but not to establish their legal responsibility for the committed violations of international norms.[17] The possibility of "directly subjecting armed groups themselves to the rule of international law" is therefore referred to by MURRAY as a legal vacuum which has to be avoided.[18] Thus, in order to fill this legal gap, it is required to have regulations on the direct responsibility of non-State armed groups. Further, there are also judicial mechanisms required where the international responsibility of armed groups can be invoked. Finally, it is also worth mentioning that holding an armed group responsible as a collective enables the direct targeting of its financial and organisational structure.[19]

3 Legal Remedies

3.1 *Inadequate Remedies to Act Effectively*

There are without doubt many paths which can be taken by the different actors involved in relief actions to react to situations of arbitrary withholding of consent. The enforcement mechanisms which are existing today, however, are not

14 See BELLAL, Direct Responsibility, p. 305.

15 As MURRAY has pointed out, this "confirms the necessity of directly subjecting the armed groups themselves to the rule of international law, so that they may be held to account and a legal vacuum avoided," see MURRAY, p. 132.

16 ZEGVELD, Accountability, p. 133; on the overall topic, see HEFFES/FRENKEL, p. 55, with further references.

17 BELLAL, Direct Responsibility, p. 308.

18 MURRAY, p. 132; see also HEFFES/FRENKEL, p. 55.

19 ALVAREZ, p. 6.

sufficient to react effectively and timely in situations of humanitarian emergencies. The possibility for humanitarian actors and non-belligerent states to seek dialogue with the respective conflict parties and, where discussions are not fruitful, to act with unfriendly acts such as denunciation, retorsion or non-binding statements by UN bodies, or even with sanctions, provide surely important tools to compel and pressure the concerned conflict parties into fulfilling their obligations.[20] Since such actions can be taken without any specific procedures, they also allow a rather flexible and fast reaction. However, where such steps remain without any effect and concrete actions have to be taken to hold the responsible actors liable and to enable the provision of relief, the existing mechanisms seem to be inadequate.

For example, humanitarian actors could theoretically provide humanitarian relief without consent of the concerned conflict party in situations of arbitrary withholding of consent and where the relevant conditions are met. But in view of the security risks and the fear of possible breaches of law, this step will hardly be taken in practice without further support by the international community. In such situations, a resolution of the Security Council could provide the required support by deciding that certain cross-border relief can be provided by specific humanitarian actors, as it has been done in Resolution 2165 (2014). But since resolutions of the Security Council are dependent on the political will of the veto powers, the adoption of such a resolution will probably be prevented in politically controversial situations. Thus, in situations where a clarifying decision at international level is particularly required.

Judicial enforcement mechanisms, on the other hand, available to States as well as to civilians, entail, with all their formal requirements and procedural steps, a long-drawn process which cannot be used to bring about a rapid decision. Further, most of the judicial remedies are not applicable towards non-State armed groups, which also severely limits their utility.[21]

3.2 *Difficulties to Enforce before the ICC*

Even though within criminal proceedings before the ICC members of the State government and of armed groups can be held responsible, withholding of consent is not considered as an independent act of crime under the Rome Statute. The practice of the ICTY shows that subsumption of withholding of consent to relief under the existing crimes is difficult and requires a further effort to prove additional elements of the given offences (particularly challenging is the proof

20 On this topic, see also STOFFELS, p. 524.

21 STOFFELS, p. 524.

of specific intentions outside of the conduct of withholding of consent). Such an additional effort could (due to the limited time and resources available for dealing with cases) prevent the ICC to address situations of arbitrary withholding of consent. This is also true for the crime of starvation, even though it mentions the impediment of relief explicitly as a possible constituent element of the offence. It was indeed an important breakthrough that Switzerland's proposal for the amendment of Article 8 of the Rome Statute was adopted in December 2019, so that causing starvation by impeding relief in situations of non-international armed conflict can in future be prosecuted before the ICC. However, since the criminal offence of starvation under the Rome Statute requires that such an impediment of relief is committed with the intent to starve civilians as a method of warfare, the additional intentional element of a further objective in connection with the impediment has to be proved in order to address arbitrary withholding of consent to relief based on this crime. It is therefore to be seen whether there will be really a change with the new amendment of Article 8 and if situations of starvation through arbitrary withholding of consent during non-international armed conflicts will actually be addressed in the future by the ICC.

Regardless of the aforementioned concerns, it is also important to note that by not including arbitrary withholding of consent as an independent criminal offence in the Rome Statute, the wrongful content of this act as such will not be fully perceived. Denying relief actions without a valid reason constitutes already a unlawful act that should be penalised, irrespective of what the further objectives of such an act are.[22] This understanding will not be recognised if it is adjusted into other criminal offences which display additional elements in order to punish such a behaviour.[23]

Finally, penalising the arbitrary withholding of consent to relief under other crimes than starvation also seems problematic in light of the maxim of *nullum crime sine lege* which is explicitly enshrined in Article 22 of the Rome Statute, stating that "[a] person shall not be criminally responsible under the Statute

22 Similar opinion is also held by ZAPPLÀ: "As a matter of fact, it may be argued that deliberately depriving the civilian population of objects indispensable for its survival should be seen per se as a war crime. There is no need to require that starvation be used 'as a method of warfare'," see ZAPPLÀ, p. 905.

23 That impeding of relief may constitute an offence which should be penalised under criminal law, is not yet agreed by all. This was also apparent in the meetings of the Working Group to the amendement of Article 8 of the Rome Statute where inter alia the view was expressed by a delegation that the wording 'by impeding of relief' should be dropped from the definition of the criminal offence of starvations for situations of non-international armed conflict, see Chapter 13 4.1.3 (4.1.3.1).

unless the conduct in question constitutes (…) a crime within the jurisdiction of the Court." Further, it provides that "[t]he definition of a crime shall be strictly construed (…). In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."[24] Thus, in other words, a conduct cannot fall within the definition of a crime when it is not provided for in the Statute. By requiring that the definition of a crime under the Statute should be interpreted strictly and in favour of the person who is to be held responsible, there is not much room left for subsumption of conducts which are not explicitly mentioned by the Statute. This makes it also difficult to prove the requirement of intention and knowledge of unlawfulness for the individual responsibility. Since in case of ambiguity the maxim requires to decide in favour of the defendant, situations of arbitrary withholding of consent can easily be exempted from criminal liability.[25]

3.3 *Limited Remedies for Civilians*

Lastly, it should be noted that the legal remedies existing for civilians, which are the ones who are directly affected by the wrongful act of the conflict parties, are very limited compared to the remedies for non-belligerent States. In this regard, the possibilities to invoke breaches of IHL are particularly limited. The available remedies further only allow for individual complaints. In situations such as the withholding of consent to relief during non-international armed conflicts, where there are thousands and even millions of civilians affected, victims require remedies which enable procedures of mass complaints. The standards provided for individual complaint procedures cannot meet the required collective treatment of claims which is required to deal with such situations without overwhelming the capacity of the judicial bodies. Today, such mass claims are possible for civilians only before claims commissions. Claims commissions also allow individuals to invoke breaches of IHL. These commissions, however, are usually set up typically in the aftermath of an armed conflict. Further, their establishment is ad hoc, meaning that a commission is only created when the required political will is given by the international community. But, as ZEGVELD correctly put it, the possibility for victims to claim should not be provided "as a favour, but as a right" and that "[t]he prospects of a wholly discretionary response by the international community to the question of setting up a claims commission will not be enough to satisfy the need for remedial effectiveness."[26]

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24 Article 22(2) Rome Statute.

25 See ROTTENSTEINER, p. 565 f.

26 ZEGVELD, Remedies, p. 523.