

Conclusion

1 Summary

When parties to a non-international armed conflict withhold their consent to international humanitarian relief in situations where the civilian population is suffering undue hardship because of a humanitarian crisis, this raises a number of legal questions. Although it is generally agreed that consent to relief should not be arbitrarily withheld in such situations, there is little understanding of what constitutes an arbitrary withholding and what the consequences are. The aim of this book was therefore to examine the legal rules and consequences of arbitrary withholding of consent to humanitarian relief, and to clarify the existing legal uncertainties. Since the provision of relief during non-international armed conflicts involves several actors, the examination was conducted from the perspective of the five main actors involved, namely the affected State, the non-State armed groups, the humanitarian actors, the non-belligerent States, and the civilian population within the affected State. This provided a holistic picture of the existing legal challenges. In the following, the most important findings of the book are summarised.

The presentation of the factual and normative elements in *Part 1* has shown the complexity of the task of *International Humanitarian Relief in Non-International Armed Conflicts*. It has become clear that the delivery of aid in non-international armed conflicts requires the interaction and cooperation of different actors. An important finding of *Part 1* is that not only armed groups with territorial control are relevant to the provision of humanitarian relief in non-international armed conflicts, but also those who otherwise have influence over access to affected areas. This approach differs from the prevailing doctrinal view, which considers only armed groups with territorial control as non-State actors whose consent may be relevant to the provision of assistance. In practice, however, humanitarian actors seek the consent of both types of armed groups. This is also imperative because, in a highly contested area, the circumstances of territorial control can change rapidly and therefore all relevant armed groups need to be considered for the safe delivery of assistance. This book therefore argues that the legal regime must reflect practical realities and concludes that both types of armed groups must also be legally considered in the context of humanitarian relief.

Part 1 further shows that not only the actors involved in international relief operations are diverse, but also the relevant legal provisions for humanitarian relief in non-international armed conflicts are found in different branches of

international law. The main source is IHL. However, since the provisions of IHL treaty law for non-international armed conflicts are limited (compared to the provisions for international armed conflicts), the only regulations relevant to humanitarian assistance in non-international armed conflicts are found in Common Article 3 to the GCs and in Article 18 AP II. In its Study on Customary IHL, however, the ICRC concluded that many of the customary rules parallel those found in the IHL treaties. The Study also notes that a large number of customary rules, including those relating to the provision of humanitarian relief, apply to both types of conflict. Customary IHL is therefore shown to be an important complementary source for the regulation of relief in situations of non-international armed conflict.

Based on the legal framework set out in Part 1, the relevant *Rights and Duties of the Actors involved in Relief Actions* could be assessed in Part 2. The broadest set of rights and obligations related to the provision of assistance could be identified for the affected State on whose territory the assistance is provided. In this context, State sovereignty is a key principle that confers not only rights but also obligations on the State towards its population. This includes, in particular, the duty to provide relief when its civilian population is suffering undue hardship and is in need of supplies essential to its survival. Thus, it is the primary responsibility of the affected State to meet the needs of its civilian population. This also applies in situations of non-international armed conflict.

Having the primary role in the provision of relief also entails the duty to facilitate external assistance in situations where the affected State is not in a position to provide the relief by itself. However, by virtue of its territorial sovereignty, the affected State retains the right to decide which actor may provide relief on its territory. The requirement of the consent of the affected State for the provision of humanitarian relief on its territory is reflected for situations of non-international armed conflict in Common Article 3 and in Art. 18 (2) AP II. In this context the question arises as to whether the consent of the affected State is also required when humanitarian relief is intended for the civilian population in areas within its territory that are no longer under its control, but are effectively under the control of armed groups, and is provided directly by neighbouring States through cross-border operations. The existing legal norms do not explicitly regulate such situations. However, with regard to the territorial sovereignty and integrity of the State, this book concludes that the consent of the affected State is always required when relief is provided on its territory, whether or not the State has control over the particular area.

The general requirement of the consent of the affected State does not mean, though, that it has a deliberate right to withhold its consent. Based on its obligation to provide humanitarian relief, it is accepted as a rule of customary

law that the affected State has a duty not to withhold its consent to relief on arbitrary grounds. Conversely, this can be interpreted to mean that in cases where there is no justifiable reason for withholding consent to assistance, the affected State has (even) a duty to provide the required consent. Once consent has been given, the affected State has a further obligation to effectively enable the provision of relief by allowing entrance and facilitating the rapid and unimpeded passage of relief. As a counterpart to this obligation, the affected State may impose technical arrangements and restrictions on the movement of humanitarian personnel and relief activities within the limits set out in AP I, which apply to situations of non-international armed conflict as rules of customary IHL.

In contrast to the affected State, the duties and, in particular, the rights of non-State armed groups are the least developed and, at the same time, the most controversial in the context of non-international armed conflicts and for situations of humanitarian relief. This book argues that armed groups involved in an armed conflict are generally bound by IHL and IHRL, whether or not they have territorial control. However, the extent to which they are bound may vary according to what authority or control they do or do not have over a territory. Non-State armed groups further have the possibility to be bound by legal provisions on the basis of special commitments. As a common basis, however, it could be assessed that all armed groups are bound by the provisions of Common Article 3 to the GCs and customary IHL (which also includes the provisions of AP II) and must respect at least the fundamental human rights with regard to the affected civilian population. Based on their duty to respect the basic human rights of the civilian population concerned, it could be deduced that armed groups must also be obliged to provide humanitarian relief to the civilian population in the area they control or over which they otherwise have significant influence. Yet, the content of this obligation may vary depending on the circumstances and the capacity of the particular armed group. If the concerned armed group is not capable of providing the necessary assistance itself, its duty to provide relief (similar to that of the affected State) includes the duty to enable the provision of relief from outside.

The book argues that the provision of relief in an area controlled by an armed group, or over whose access an armed group has otherwise significant influence, requires (as with the affected State) the consent of that armed group. It is explained that obtaining the consent of such armed groups is not only necessary for practical security reasons – as applied in practice today – but also makes sense from a legal perspective. After all, in the context of armed conflict, armed groups will only respect legal regulations if they do not restrict their ability to wage effective war and opposition. Thus, if armed groups are to

be realistically expected to enable relief efforts, they must also be given legally the right to decide who can enter the territory they control or over which they otherwise have influence. Based on their duty to provide relief, however, armed groups cannot arbitrarily withhold this consent. Once they have given their consent, they have the same obligation as the affected State to allow and facilitate the delivery of relief, but based on the previous considerations, namely that they must be able to wage war and resist effectively, the armed groups must also be given the right to make technical arrangements and limitations to the provision of relief.

With respect to the legal position of international humanitarian actors, it is shown that this is limited in particular to their duty to respect humanitarian principles and their right to offer the provision of assistance. With regard to non-belligerent States, it is to be noted that they may be directly affected by humanitarian relief operations intended for the civilian population of the affected State, if the international relief operations are initiated on or have to pass through their territory. This concerns primarily non-belligerent States that are neighbouring countries of the affected State. In this role, the non-belligerent States have similar obligations and rights as the affected State regarding the entry and transit of relief convoys and goods on their territory. Finally, Part 2 of the book deals with the legal status of the affected civilians, showing that the most relevant legal provisions for them in the context of relief operations are their basic human rights, such as the right to life, food, and essential medicines, which must be respected by the parties to the conflict. Even though conflict parties have a duty to provide relief, it is unsettled whether civilians also have an independent and enforceable human right to receive such relief. The debate is more theoretical than practical, however, as the fundamental human rights mentioned already guarantee civilians that their needs for essential relief will be met in situations of humanitarian crisis.

Against the background of the relevant legal provisions governing the provision of assistance set out in Part 2, the issue of *Arbitrary Withholding of Consent to Relief Operations* was examined in more detail in Part 3, in particular the questions of what constitutes a withholding of consent to relief, where the legal basis for the prohibition of arbitrary withholding lies and, most importantly, when a withholding of consent can be considered to be arbitrary. The book first establishes that, in addition to an explicit disapproval, consent to relief can also be implicitly withheld by failing to respond to requests for relief, or by withdrawing the consent given by imposing subsequent restrictions that make the provision of relief factually impossible. It is then shown that although the prohibition of arbitrary withholding of consent to relief is recognised as a rule of customary law, there is not much said about where the respective *opinio*

iuris and practice lies. An examination of this question revealed that the *opinio iuris* on the prohibition of arbitrary withholding of consent to relief can be derived from the grammatical, effective, and historical interpretation of the APS to the GCs, and that subsequent State practice and agreements have hardened this conviction into a rule of customary international law.

Since the requirement of consent only arises when the preconditions for the provision of humanitarian relief are met, the concerned conflict party may, in situations where these conditions are not met, refuse the offered relief simply by referring to the unmet conditions. In the author's view, it would be more accurate to refer to such a response to relief at this stage as a refusal of relief rather than a withholding of consent. These two situations and terms are often confused in doctrine and practice. However, a proper distinction between the two situations is important in assessing the grounds that may justify the respective action. While a valid refusal requires only that the conditions for granting relief are not met, situations of withholding consent must be justified on the basis that there are valid reasons for not granting consent to relief. The latter justification is more complex and requires a proper analysis of the situation and, in particular, of the motives of the parties to the conflict, whereas the legitimacy of a refusal can be assessed on the basis of given, easily ascertainable external circumstances.

There is no general definition of what may amount to arbitrary withholding of consent. However, based on the various attempts in doctrine and practice to identify the circumstances and character of arbitrary withholding, this book has identified four essential elements which qualify a withholding of consent to humanitarian relief as arbitrary, namely:

- where there is no legitimate aim pursued by the withholding of consent,
- when the withholding of consent constitutes a violation of another obligation under international law with respect to the civilian population,
- when consent is withheld in a manner that violates the principles of necessity and proportionality; or
- where consent is withheld in a manner that is otherwise inappropriate.

Of practical importance are, in particular, circumstances in which the withholding of consent to relief operations may violate other international obligations that parties to a conflict should respect towards the civilian population. Other international obligations that could be violated by a withholding of consent to humanitarian relief may include obligations under IHRL, IHL and/or international criminal law. This book has identified the most common breaches of obligations that can be invoked in situations of withholding of consent to relief. Some of them are found – due to their importance – as prohibited acts in all three branches of law.

In this respect, particular mention should be made of the act of starvation, which is prohibited not only under IHRL as a violation of the fundamental right of the civilian population to food, but also under IHL and as a war crime under the Rome Statute when used as a method of warfare. The specificity of this offence is that it explicitly mentions the obstruction of relief as a possible means of causing starvation. It is the only prohibition currently found in international law that explicitly refers to relief operations and considers their obstruction to be a wrongful act, although it additionally requires that the obstruction must be carried out with the intention of causing starvation and that it must be used as a method of warfare. Nevertheless, it is the offence most likely to be invoked in situations of arbitrary withholding of consent to relief. It was therefore an important step forward when, in December 2019, after years of criticism and doctrinal debate, starvation was finally adopted as a war crime under the Rome Statute, which can also be committed in non-international armed conflicts.

How can the infringements caused by the arbitrary withholding of consent to relief be invoked? This question is addressed in *Part 4* of this book under *Legal Consequences of Arbitrary Withholding of Consent*, where the possibilities of holding the parties to the conflict responsible are explored. In this respect, it is striking that the possibilities to hold armed groups responsible are considerably limited compared to those against the affected State. At present, there is no provision for holding non-State armed groups directly and as an entity liable under international law.

A question that has been widely debated in recent years in the context of arbitrary withholding of consent is whether humanitarian actors should have the right to provide assistance in such situations without the consent of the concerned conflict party. Doctrine has identified three (theoretical) situations in which the provision of humanitarian relief without consent may be exceptionally justified, namely:

- when such relief actions are imposed by the UN Security Council through a binding resolution based on Chapter VII of the UN Charter,
- when the principle of necessity can be invoked,
- or when relief actions are applied as countermeasure against the affected State.

Although the latter two situations could in theory eliminate the unlawfulness of providing humanitarian assistance without consent, there are no examples of their application in practice. The reason for this may lie in the fact that legal arguments alone cannot alleviate the security concerns of humanitarian actors. Acting on the basis of an authorisation in a Security Council resolution therefore appears to be the safest way for humanitarian actors to provide

assistance without consent. Such authorisation was provided by the Security Council in its Resolution 2165 (2014), when it decided that UN humanitarian agencies and their implementing partners could provide relief to the Syrian population through certain cross-border routes without the consent of the Syrian Government. Since then, however, the Security Council has not adopted any similar resolutions. Furthermore, in 2020, three of the four border crossings originally authorised for assistance under 2165(2014) were not renewed due to vetoes by Russia and China, and in July 2023, the renewal of the remaining one border crossing also failed following a veto by Russia. This event (once again) underlined the reliance of the Security Council on the goodwill of its permanent members to adopt politically controversial resolutions, and that political tensions can limit the Security Council's ability to act in precarious situations. Although non-belligerent states would have a strong legal remedy against arbitrary denial of consent in the form of the Security Council resolution, the effectiveness of this mechanism suffers due to its political susceptibility. However, non-belligerent States also have other avenues to act in situations of arbitrary withholding of consent. Based on their duty under Common Article 1 of the Geneva Conventions to ensure respect for IHL, it is argued that they have not only a right but an obligation to act against situations of arbitrary withholding of consent.

Part 4 ends with an overview of the remedies available to the affected civilians and concludes that they are unsatisfactory. In contrast to non-belligerent States, the remedies available to civilians are limited. Moreover, existing complaint mechanisms only allow for individual complaints, which are not an adequate form of remedy in situations of armed conflict (where there are large numbers of affected individuals).

The findings from the previous parts show a clear picture: a quick and effective response to situations of arbitrary withholding of consent is currently not possible. Against this background, *Part 5* of the book identifies the *existing legal gaps and required developments* to better address the existing shortcomings. Three main problems have been identified that need to be addressed through further legal developments:

- (1) *The law governing humanitarian relief.* The existing regulations are not known because there is no comprehensive written legal instrument containing all the relevant provisions and accessible to all actors involved in relief operations. There is also uncertainty about the applicability of IHL rules, as there is no binding decision on when internal tensions amount to a non-international armed conflict. The content of the relevant provisions also requires some clarification. For example, the arbitrary withholding of consent is not explicitly addressed by any binding

legal provision. Nor is there any definition of what might constitute arbitrary withholding of consent. But even if the elements of arbitrariness were clear, it would still be a difficult task to determine whether a situation is arbitrary or not, since a proper assessment requires knowledge of the factual circumstances in the country. Such an assessment cannot therefore be made at a distance. To overcome these difficulties, the book proposes:

- to enhance knowledge of the applicable law through dissemination;
 - to encourage frequent discussions between States in regular meetings. In this respect, the lessons learned from the Swiss/ICRC Initiative could be utilised;
 - To clarify the content of existing regulations on humanitarian assistance in non-international armed conflicts in documents (binding or non-binding) that are easily accessible to all actors involved in relief operations, including the civilian population;
 - and finally, to mandate an international, independent body with the task to monitor and assess situations of arbitrary withholding of consent to relief. In order to make a determination, this body should be able to form an opinion on the ground and therefore be allowed into conflict areas. This could, for example, be a new mandate for the International Fact Finding Commission.
- (2) *The legal status of the non-State armed groups.* It is still unclear whether and to what extent non-State armed groups are bound by international law. Moreover, the question of whether armed groups should enjoy rights in addition to obligations is not addressed at all in these discussions. The author argues that if armed groups are to fulfil their obligations, it is essential that they are guaranteed certain rights in return. This is particularly important in armed conflicts, where IHL should provide rules that enable both parties to the conflict to wage war effectively. However, it is difficult to define the rights and obligations of armed groups if they are not recognised as subjects of international law.

Another current problem is the exclusion of armed groups from the law-making process. Yet, in order to improve implementation and compliance, it is necessary to also hear and understand the views of those affected by a law. This will give armed groups not only some ownership of the regime and a greater willingness to respect it, but will also allow the international community to adopt rules that are actually practicable. Finally, it is also unsatisfactory that only members of a non-State armed group can be held legally accountable, but not the armed group as an

entity. In this way, the injustice manifested by the armed group through its actions as a collective is not addressed. It is therefore suggested:

- to acknowledge non-State armed groups as subjects of international law with obligations and also rights;
- to integrate non-State actors in the law-making process;
- and to establish direct responsibility for non-State armed groups.

With regard to the subjectivity of non-State armed groups, the author stresses that the concept of legal subjectivity should not be confused with legitimacy. The recognition of armed groups as subjects of international law does not confer legitimacy on their existence or objectives, but rather enables their actions to be legally perceived and their violations to be identified. According to the author, the exclusion of armed groups as subjects of international law is an outdated view based on false fears that adds no value but only complicates the legal encounter with today's reality.

(3) *Legal remedies.* The currently existing law enforcement mechanisms are not sufficient to respond effectively and timely to situations of arbitrary withholding of consent to relief operations. In particular, the efforts of the Security Council can be undermined by vetoes by its permanent members. Another problem is the enforcement of arbitrary withholding of consent to humanitarian relief as a criminal offence. As the Rome Statute does not recognise arbitrary withholding of consent as a separate offence, it is difficult to prosecute before the ICC. Finally, the existing remedies available to the affected civilians are not only limited, but also inadequate for situations of arbitrary withholding of consent, where large numbers of civilians are affected by the violation. Steps that could be taken to fill these gaps are:

- (based on doctrinal discussions) introduction of the possibility for the UN General Assembly to authorise humanitarian relief operations in situations where Security Council decisions could be blocked by vetoes. Although such resolutions do not have the same binding effect as Security Council resolutions, they can reflect the majority opinion of States and can therefore have an important political impact on the behaviour of parties to a conflict.
- inclusion of arbitrary withholding of consent to relief as a separate crime in the Rome Statute;
- establishment of a special commission to which civilians could appeal without significant obstacles and which could deal with collective complaints from affected civilians and thus determine the extent of collective suffering.

2 Closing Remarks

In recent years, the arbitrary withholding of consent to humanitarian relief actions has received more attention in practice and doctrine. While this is encouraging, discussions on this issue need to continue. Much remains to be clarified and established. The existing uncertainties about the legal situation of arbitrary withholding of consent impede an effective response by the international community. To be effective, the law must reflect the existing reality. Unfortunately, this is not yet the case. The arbitrary withholding of consent to relief operations needs to be explicitly addressed as a legal problem in the existing rules governing non-international armed conflict. In this respect, the perception and understanding of non-State armed groups must be taken into consideration. Armed groups today exercise governmental-like authority in many places and have significant influence over access to millions of people around the world. Non-State armed groups must therefore be included in the discussion on how the arbitrary withholding of consent to relief can be legally and effectively regulated. At the same time, it is important that those responsible for violations – whether armed groups or States – are actually held accountable. This requires that existing enforcement mechanisms are applied and that new developments are pursued where legal gaps exist.