When are states and armed groups obliged to accept humanitarian assistance?

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Recent refusals (or restrictions for all practical purposes equivalent to refusals) in Syria and Sudan have reminded us of a problem humanitarian actors are often confronted with: they want to deliver humanitarian assistance, persons are in desperate need of humanitarian assistance, but the authorities controlling the territory where those in need find themselves do not allow it. In order to better understand their options in these situations, humanitarian actors need a clear grasp of the legal basis of such behaviour.

When humanitarian access is restricted in the context of an armed conflict, this problem is governed by international humanitarian law (IHL). In international and non-international armed conflicts, both treaty-based and customary IHL prescribes that whenever the civilian population is in need of and is not provided supplies essential to its survival, humanitarian and impartial relief actions shall be undertaken, without any adverse distinction (arts. 70 and 18(2), respectively of Additional Protocols [APs] I and II to the Geneva Conventions). However such relief actions are subject, according to the treaty rules, to the consent of the state concerned.

The ICRC Commentaries on the APs, the Customary Rules of IHL identified by the ICRC, and the Guiding Principles on Internal Displacement consider, however, that if the conditions for humanitarian relief actions listed above are fulfilled, consent may not be arbitrarily withheld. This interpretation is reasonable, because otherwise the aforementioned rules would be superfluous. With the consent of the state concerned, everything from red paint to computer games may be delivered to persons under its jurisdiction. For this we would not need a rule.

When, however, is denial of consent arbitrary? In my view, we should not focus on defining such arbitrariness, inter alia, because it is not very efficient to start a negotiation with a minister or a general by claiming that he or she is acting arbitrarily. This may nevertheless be a useful argument before the UN Security Council or when appealing to third states to ensure respect of IHL.

Generally, I would rather invoke in the first instance other international obligations that make it compulsory to accept an offer of assistance. From a legal point of view, the fact that the abovementioned treaty rules subject relief actions to a state's consent does not mean that a state does not have to comply with its other obligations:

- Art. 23 of the Fourth Geneva Convention (GC IV) requires a state to allow passage for a limited range of goods (among them medical supplies) and food assistance for certain beneficiaries (children under fifteen, expectant mothers, and maternity cases). This treaty rule applies in international armed conflicts, but there is a growing tendency in IHL to invoke the same rules in non-international armed conflicts;
- Art. 59 of GC IV requires an occupying power to consent to relief actions for the benefit of populations of occupied territories who are in need;
- Provisions in the First and Third Geneva Conventions (GC I and III) require the facilitation of medical assistance (even for the benefit of combatants) and of assistance to prisoners of war;
- Art. 54(1) of AP I prohibits starvation of civilians as a method of warfare;
- The state withholding consent is required to respect, protect, and fulfill its human rights obligations, specifically, the right to life, to food, to shelter, to health, and the prohibition of inhuman and degrading treatment of the civilian population;
- Art. 3 common to the Geneva Conventions, as well as human rights law, prohibits discrimination if the refusal concerns only assistance to certain beneficiaries or if only
beneficiaries of a certain race, color, religion, faith, sex, birth, or wealth are concerned or actually need outside assistance;

Moreover, when the population in need is in an area under control of an armed opposition group and the government withholds consent, consent by the armed group is in my view sufficient. Indeed, art. 3 common to the Geneva Conventions allows an impartial humanitarian body, such as the ICRC, to offer its services to the parties to the conflict. The use of the plural in “parties” shows that rebel armed groups may be addressees of an offer and if they accept the services, the humanitarian body may proceed. The state has accepted such (cross-border) action by becoming a party to the Geneva Conventions. For sure, art. 18(2) of AP II requires that relief actions have the consent of the state “concerned”, but under an innovative interpretation some argue that the territorial state is not “concerned” if the relief does not pass through territory controlled by the government in question.

I would invoke the argument that a refusal of consent is arbitrary, based on that it constitutes an abuse of the competence of the state to give its consent, only as an addition to those mentioned above or when none of them can be used. In practice, it leads to the same results, because it may be argued that a refusal of consent is arbitrary if its purpose is to violate another obligation or if it is discriminatory. In addition, it is arbitrary if it is motivated by reasons other than those for which the requirement of consent was introduced: the protection of the territorial sovereignty of the state and cases of military necessity (e.g. imminent military operations on the route through which the assistance should be delivered).

However, humanitarian actors must remember counterarguments a state denying consent may legitimately invoke:

- That it is not their organisation that has a right to assist, but rather the civilian population that has the right to be assisted. If the population can be assisted otherwise, a given organization may be refused;
- That except for medical assistance, which may equally benefit wounded and sick combatants, the assistance may only benefit civilians; therefore, if insurgents control a territory, the governmental side may require control of the distribution of the humanitarian aid, to ensure that only civilians benefit.

To conclude, the existing IHL on humanitarian assistance is not perfect and deserves development and clarification. States are, however, not ready to develop it at present. In the meantime, the existing rules offer humanitarians a variety of arguments.

About the author

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Marco Sassòli graduated as doctor of laws at the University of Basel (Switzerland) and was admitted to the Swiss bar. He has worked from 1985-1997 for the International Committee of the Red Cross at the headquarters, inter alia as deputy head of its legal division, and in the field, inter alia as head of the ICRC delegations in Jordan and Syria and as protection coordinator for the former Yugoslavia. During a sabbatical leave in 2011, he joined again the ICRC, as legal adviser to its delegation in Islamabad. He has also served as executive secretary of the International Commission of Jurists and as registrar at the Swiss Supreme Court.

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