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Legal expert opinion

on

The right to provide and receive humanitarian assistance in occupied territories

submitted by

Michael Bothe

Professor emeritus of Public Law, Frankfurt/Main

This legal expert opinion is tasked to clarify legal principles governing the provision of assistance by humanitarian agencies in the Occupied Palestinian Territory, in particular in Area C of the West Bank.

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Summary

The need for this expert opinion is triggered by the fact that Israel, the occupying power, in various ways impedes humanitarian assistance given by various organizations to the population of the OPT which needs such assistance. This opinion is tasked to assess the legality or otherwise of these restrictive measures in the light of the general law governing belligerent occupation and the rules concerning relief operations contained in the Fourth Geneva Convention and in customary humanitarian law. Human rights law is also relevant in this respect.

A duty to accept and facilitate relief actions can, first, be derived from the duty of the Occupying Power to provide for the wellbeing of the population of the occupied territory, an obligation enshrined in the customary law of belligerent occupation. In accordance with this principle, international humanitarian law establishes a duty to accept and facilitate relief operations for the benefit of the population in need. Such operations are subject to the agreement of the Occupying Power, but the consent may not be withheld for arbitrary reasons. Withholding consent is, in particular, arbitrary if the denial violated other norms of international law, in particular human rights.

Judged in the light of this yardstick, a number of Israeli practices restricting relief are legally objectionable. For instance, humanitarian assistance often consists in aid to building facilities which are needed by the population, e.g. schools or health care establishments. Consent to these activities may not be withheld arguing a lack of building permits. The building laws in Area C have been modified and are applied in a way which makes it virtually impossible for Palestinians to obtain any building permit. This practice contravenes the fundamental obligation of the Occupying Power to provide for the wellbeing of the population and to respect private property (which includes the right of owners to appropriately use their). Therefore, the enforcement of the law which is contrary to international law does not justify withholding the consent to assistance in building nor the demolition of buildings erected without permit.

The Occupying Power may prevent relief actions undertaken without consent where such consent is lawfully withheld. Where consent is unlawfully withheld, preventing relief actions nevertheless undertaken would be equivalent to enforcing an unlawful behaviour, which constitutes an abuse of rights.

Personnel belonging to relief operations may not be attacked or harassed and must be allowed to efficiently perform its humanitarian functions. Abusive bureaucratic barriers for relief workers are prohibited. Even if relief actions are undertaken without the consent of the occupying power, relief workers enjoy the protection against attack to which they are entitled as civilians, and they remain under the protection of human rights law.

The consent requirement means that some information on relief operations which are planned must be given to the Occupying Power, but withholding some information for the

sake of protecting the beneficiaries must be allowed. Generally speaking, there must be some cooperation between the organizations providing relief and the Occupying Power. This may not be misunderstood as acquiescence in restrictive practices of the Occupying Power held to be unlawful.

Third States, i.e. States not parties to the conflict, have an important role in ensuring compliance with the rules concerning humanitarian assistance. They may be affected in their individual rights where relief personnel belonging to them is not treated according to the rules or where property belonging to that State or its nationals is seized or damaged. Third States also have the right to demand compliance by the Occupying Power as they have the right and duty to ensure compliance with the Geneva Conventions according to common Article 1 GC. As most of the rules regarding humanitarian assistance establish *erga omnes* obligations, all States are entitled to demand their respect. There is a vast array of measures which third States can, and as the case may be must, take for this purpose. What is important is an appropriate mix of such measures.

International law provides a solid basis for humanitarian assistance. The core of the legal issues is the general obligation of the Occupying Power to provide for the wellbeing of the population of the occupied territory. This rule is also the rationale for the basic obligation of the Occupying Power to accept and facilitate relief operations. Admittedly, the Occupying power has security interests which it may safeguard by appropriate measures. But it may not do so in a way which compromises the said basic duty to accept and facilitate relief actions. Doubts about the legal situation must be solved taking this fundamental principle into account. Third States have various possibilities to induce the Occupying Power to comply with its obligations – which is an important humanitarian asset.

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1. Background

A considerable amount of assistance is given to the population of the OPT by international or foreign humanitarian agencies, both governmental (EU, OCHA) and non-governmental. The need for such expert opinion is prompted by certain Israeli practices which impede such assistance in various ways.

These practices consist in particular of the following measures:

- Application of a restrictive and discriminatory planning system to humanitarian projects in Area C,
- Destruction of installations built in the framework of humanitarian assistance, and of relevant equipment,
- Seizure or confiscation of such installations or equipment,
- Restrictions on movement and access of humanitarian workers,
- Harassment, detention or arrest of humanitarian workers.

2. General legal framework

Before addressing a number of specific questions to be raised in this respect, a general overview of relevant rules concerning the rights and duties of the Occupying Power must be given.

Belligerent occupation is governed by[1]

- Customary international humanitarian law, to a large extent codified by the Hague Regulations;[2]
- Geneva Convention IV on the protection of civilian in armed conflict;[3]
- International human rights law, including the ICCPR[4] and the ICESCR[5].

Israel admits the applicability of the relevant rules of customary humanitarian law. It denies the *de iure* application of the IVth Convention. That question, however, must be regarded as

[1] M. Bothe, 'The Administration of Occupied Territory', in A. Clapham et al. (eds.), The 1949 Geneva Conventions: A Commentary, 2015, pp. 1455-1484, at MN 3-5; E. Benvenisti, 'Occupation, Belligerent', paras. 12-16, in R. Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, www.mpepil.com (last visited 4 July 2015) (hereinafter MPEPIL); Y. Dinstein, The International Law of Belligerent Occupation, CUP 2009, at 4 *et seq.*, on human rights at 69 *et seq.*

[2] Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, and its Annex: Regulations Concerning the Laws and Customs of War on Land.

[3] Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287. The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3, only adds a few details regarding the law of belligerent occupation.

[4] International Covenant on Civil and Political Rights, 16 December 1966.

[5] International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

settled in the light of the Advisory Opinion of the International Court of Justice on the construction of a wall in the OPT[6] and of various instruments adopted by UN organs. The IVth Geneva Convention applies.

Israel also denies the applicability of international human rights norms in the OPT (so-called extra-territorial application). On the basis of several holdings of the ICJ,[7] that question, too, must be regarded as settled in the sense that relevant human rights law applies.

3. The general duties of the Occupying Power

The powers exercised by an occupying power are defined in the Hague Regulation as a *de facto* authority, as distinguished from the legal authority exercised by a State on its territory. This is reflected in the text, French being the only authoritative one:

> Art. 42. "Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie."
>
> Art. 43. "L'autorité de pouvoir légal ayant passé de fait entre les mains de l'occupant ... "[8]

The *de facto* character of this power of the occupant has been clearly explained, already in 1950, by R. Baxter, one of the World's leading specialists on the law of armed conflicts of the last century:[9]

> "The source of the inhabitants' duty of obedience can only be the power of the occupant to demand it. The law must take as its starting point the fact of military supremacy and then set forth to place limits of reasonableness on the occupant's *factual capacity* to control those who within the area he holds."

The same principle is formulated by the UK Manual on the Law of Armed Conflict:[10]

> "The law of armed conflict does not confer power on an occupant. Rather it regulates the occupant's use of power. The occupant's powers arise from the actual control of the area."

[6] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 101.
[7] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para. 24; *Construction of a Wall* (note 6), para. 106.
[8] Emphasis by the author.
[9] R.R. Baxter, 'The Duty of Obedience to the Belligerent Occupant', 27 BYIL 235-266 (1950), at 261, emphasis by the author.
[10] UK Ministry of Defence, The Manual of the Law of Armed Conflict, 2004, para. 11.9. See also Dinstein, *op.cit.* note 1, at 46, 49 *et seq.*

This *de facto* power is shaped and limited by international law. The law permits the occupying power to exercise certain specific competences[11] and enjoins it to refrain from certain acts. The power is, in particular, subject to a number of duties.

The general duties of an Occupying Power are formulated in a general way in Art. 43 of the Hague Regulations. The only authoritative version of the Regulations is French, and as the English text in general use does not accurately render the French original, the latter must be quoted as the starting point of the analysis:

> "[L'occupant] prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays."[12]

This obligation to ensure public order and public life means a general duty to ensure the wellbeing of the population, as far as possible under the circumstances. It is, in modern parlance, a duty of good governance.[13]

This implies a number of specific duties to provide for the wellbeing of the population. An important aspect of this duty are specific rights accorded to the population by further provisions of the HR and GC IV. Of particular importance is Art. 46 HR:

> "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.
>
> Private property cannot be confiscated."

GC IV also contains a general guarantee of personal rights (Art. 27):[14]

> "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious conviction and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected against all acts of violence ..."

There is no guarantee of private property as in the HR, but according to Art. 53 GC IV, the

> "... destruction of real or personal property ... is prohibited, except where such destruction is rendered absolutely necessary by military operations."

This is a very narrow permission for destructions which does not cover demolitions as practiced by Israel. It will be discussed below whether other aspects of the law of occupation could nevertheless justify such practices.

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[11] Dinstein, *op.cit.* note 1, at 46 speaks of "jurisdictional rights".
[12] The English text in general use is "public order and safety", which is less far reaching then "ordre et vie publics", Benvenisti, *loc.cit.* note 1, para. 22.
[12] The English text in general use is "public order and safety", which is less far reaching then "ordre et vie publics", Benvenisti, *loc.cit.* note 1, para. 22.
[13] Bothe, *loc.cit.* note 1, MN 8 and 33.
[14] This provision is not limited to occupied territories.

GC IV adds specific duties concerning particular aspects of the wellbeing of the population:

- education (Art. 50),
- health services (Art. 56),
- provision of food and medical supplies (basic needs, Art. 55).

In parallel to these norms of international humanitarian law, human rights law applies and guarantees a number of relevant rights to the members of the population of occupied territories. These are in particular:

- the right to liberty and security of person (Art. 9 ICCPR),
- freedom from interference with privacy, family or home (Art. 17 ICCPR),
- protection of the family (Art. 23 ICCPR, Art. 10 ICESCR),
- right to an adequate standard of living (Art. 11 ICESCR), "including food, clothing and housing",
- right to health (Art. 12 ICESCR),
- right to education (Art. 13 ICESCR).

4. Rules relating to relief actions

Art. 43 HR does not specify the means through which the occupying power would fulfil its general duty to provide for the wellbeing of the population. If it is unable to do so with its own resources, relief actions undertaken by third actors may be a way. Thus, the general duty of the Occupying Power enshrined in the customary law of belligerent occupation is a basis for duty to accept and facilitate relief. As will be shown, the general duties of the Occupying Power are relevant for a number of important details of humanitarian assistance.

Yet international humanitarian law also contains a number of specific rules concerning relief operations. Art. 59 GC IV is of particular importance for the questions covered by the present opinion, namely a duty of the occupying power to allow and facilitate relief actions:

> "If whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all means at its disposal.
> Such schemes, which may be undertaken by either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing."

Accepting and facilitating relief is a secondary obligation of the Occupying Power. Art. 60 expressly states that such relief actions shall not free the Occupying Power from its primary obligations in relation to the wellbeing of the population, in particular the obligation to ensure the food and medical supplies (Art. 55 GC IV) and the functioning of the health care system (Art. 56 GC IV).

Art. 69 AP I of 1977 adds a few items to the basic needs formulated in Art. 55 GC IV. Relief actions for occupied territories

> "shall be implemented without delay".

As Israel has not ratified AP I, the latter provision is not binding as a matter of treaty law, but it may be considered as constituting customary law, which *ipso facto* applies to all States. In order to create more certainty as to which particular rules constitute customary law, the ICRC has published an expert study restating the relevant rules of customary humanitarian law, including the necessary references of State practice,[15] which confirms the customary law character of the provisions regarding relief.

The obligation imposed on the occupying power is twofold: an obligation to agree and an obligation to facilitate, the latter going beyond the obligation to agree. As formulated, these obligations are absolute, not subject to any conditions.[16] The only condition clearly implied in the very text of Art. 59 GC IV is that there must be an "agreement". This requirement safeguards the control interest of the occupying power which enables the occupying power to fulfill its responsibilities, already mentioned.

The provision does not specify how this agreement is to be concluded. As a rule, it will first be requested by the organization planning to undertake a relief action. The provision does not provide for any refusal to conclude such an agreement for whatever reason. However, there are few if any absolute duties. Concerning the occupying power's possibility to refuse an agreement, a rule which has been developed in the interpretation of the provision on relief for non-occupied territory (Art. 70 AP I) might be applied as well for relief action destined for occupied territories, namely that the necessary agreement may only be refused for valid reasons, not for arbitrary or capricious ones. This seems to be a reasonable interpretation although the powers of control which the occupying power possesses are of a nature different from that of territorial control possessed by a State on its own territory, as already explained above. Regarding Art. 70 AP I, this interpretation is firmly established by the negotiating history.[17]

This raises the question what is a valid and what an arbitrary reason. Details concerning this problem and the ensuing practical questions will be addressed below.

In addition to the specific provisions of international humanitarian law relating to relief, the provisions of human rights law mentioned above are also relevant for relief actions. In particular the provisions of the ICESCR imply a positive duty of the occupying power to take measures for the purpose of enabling the inhabitants of the occupied territory to enjoy the respective rights, and to do so also through international cooperation (Art. 2 ICESCR). An

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[15] ICRC/J.-M. Henckaerts/L. Doswald-Beck, Customary International Humanitarian Law, Cambridge 2005; on the duty to facilitate relief actions: vol. 1, p. 194.

[16] J. Pictet (dir. publ.), Les Conventions de Genève du 12 août 1949. Commentaire, vol. IV, Geneva 1956, p. 344.

[17] M. Bothe, in M. Bothe/K.J. Partsch/W.A. Solf, New Rules for Victims of Armed Conflicts. Commentary on the Two Protocols Additional to the Geneva Conventions of 1949, 2nd ed. Leiden/Boston 2013, p. 485.

appropriate form of this cooperation is allowing and facilitating relief actions. This legal situation must be taken into account in the determination of what constitutes an arbitrary withholding of consent.

5. The application of the general rules of the law of occupation to practices impeding relief

5.1. Withholding consent

Arbitrary withholding consent is a contextual question. This opinion tries to highlight certain important examples of arbitrary refusals.

Inter alia, withholding consent is arbitrary if it, or the purpose behind it, violates other obligations of the occupying power.

Humanitarian projects which suffer from refusals often tend to establish some kind of building or fixed installation (schools, health centers, water works). The reasons for refusal are often said to be based on the necessity of enforcing the law, namely applicable building law. At a first glance, the enforcement of building laws can be considered as being derived from the duty of the occupying power to ensure public order and life (Art. 43 HR). But as a matter of legal logic, the occupying power cannot be allowed to enforce building laws if these building laws themselves contravene the international law of occupation. There is indeed a basic flaw in the planning law relating to Area C. It is applied, and the pre-existing law has been amended in a way which makes any meaningful and reasonable land use planning, including the necessary participation of the Palestinian population in the planning process, impossible.[18] Land use planning which allows building exclusively works for the benefit of the settlements.[19] It is therefore discriminatory. It makes it impossible for Palestinian landowners to make a reasonable use of their real property. The *de facto* prevention of legitimate uses of real property violates the guarantee of private property enshrined in Art. 46 HR. Enforcement of such law is a violation of the international law of occupation. Withholding consent as a means to enforce these unlawful building laws is therefore "arbitrary".

Denying consent for building schools or medical facilities where these are needed by the population will also be a violation of the rights to health and education (Art. 12 and 13 ICESCR). For this reason too, such refusal is arbitrary in the sense just described.

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[18] See UN Office for the Coordination of Humanitarian Affairs: Restricting Space: The Planning Regime Applied by Israel in Area C of the West Bank, December 2009; Human Rights Committee, International Covenant on Civil and Political Rights, Concluding observations on the fourth periodic report of Israel, Doc. CCPR/C/ISR/CO/4, 21 Nov. 2014, para. 9; T. Boutruche/M. Sassòli, Expert Opinion on International Humanitarian Law Requiring the Occupying Power to Transfer Back Planning Authority to Protected Persons Regarding Area C of the West Bank, pp. 24 et seq., available at http://rhr.org.il/heb/wp-content/uploads/62394311-Expert-Opinion--FINAL-1-February-2011.pdf. (last visited 4 June 2015)

[19] Human Rights Committee, *loc.cit.* note 18, para. 9.

The real reason for refusing consent to humanitarian relief operations is often designed to implement an overall land use concept for Area C which tries to concentrate the Palestinian population in certain urban areas and leave or create free space for Israeli settlements and military activities. This is an unlawful purpose, as it furthers the settlement policy which violates Art. 49 GC IV, prevents the freedom of movement of the Palestinian population and violates the Palestinian right to self-determination because it creates (and is meant to create) conditions which jeopardize the viability of the Palestinian State.[20] Refusal of consent based on these considerations is "arbitrary".

As the refusal of consent also means a denial, or at least a restriction, of human rights, refusal is subject to the principles of necessity and proportionality, which mark a general limit of all limitations of human rights. A refusal violating the principles of necessity and proportionality is therefore "arbitrary".

5.2. Demolitions

The only provision allowing the destruction of property in occupied territories is Art. 53 GC IV quoted above. Its conditions are by no means fulfilled in the cases of demolitions under review in the present context. As far as can been seen, Israel does not rely on Art. 53 or a corresponding provision of customary law.

Instead, it is argued that house demolitions are measure to enforce building laws and as such justified by Art. 43 HR. Demolitions of unlawfully erected buildings were lawful under the law in force in the occupied territory when the occupation began, in this case Jordanian law. However, that enforcement measure is unlawful because, as already stated in relation to withholding of consent, the building law in question itself constitutes a violation of the law of occupation. This law, as applied and modified by the Israeli administration, makes it virtually impossible for a Palestinian to erect any new building in Area C. This is a violation of the right to the protection of private property (Art. 46 HR) and of fundamental social rights. The enforcement of a law which violates international law cannot be internationally lawful.

These measures at least constitute a limitation of the right to the respect of property enshrined in Art. 46 HR. As any limitation of fundamental rights, such limitation is itself limited by the rule of necessity and proportionality. Proportionality requires a balancing of the pros and cons of a measure. In this context, the needs of the population, its social rights (rights to an appropriate standard of ling, to health and to education) put a heavy weight on the scales on the side of the cons.

Any form of "confiscation" is prohibited by Art. 46 HR.

The demolitions are also a violation of Art. 17 ICCPR (freedom from arbitrary or unlawful interference with one's home). As this interference is unlawful under the law of armed

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[20] See ICJ, *Construction of a Wall, loc.cit.* note 6, in particular para. 122.

conflict which primes any otherwise applicable local law, it must also be considered as "unlawful" in the meaning of Art. 17 para. 1 ICCPR.[21]

5.3. Relief actions without consent

Where consent is lawfully withheld, the consequences for the persons or institutions undertaking relief actions differ depending on the legal status of the relief organization. If the action is undertaken by a State or by an intergovernmental organization, undertaking a relief action without (lawfully withheld) consent is an internationally wrongful act. But if the operation is undertaken by an entity which is not acting on behalf of a State or an intergovernmental organization, conducting the operation does not constitute an internationally wrongful act as there is no subject of international law to which the activity in question can be imputed. But it is a risky act as it is internationally lawful if the occupying power prevents such activity. The measures preventing such unauthorized relief are governed by the law of the occupying power.

As most relief actions are financed or otherwise sponsored by States or intergovernmental organizations, it has to be asked whether it is also an internationally wrongful act for a State or intergovernmental organization to finance or otherwise promote relief actions undertaken by non-governmental organization without the (lawfully withheld) consent of the occupying power. As a matter of legal logic, a State should not be entitled to finance or promote activities which, if undertaken by the State itself, would be unlawful.

In this connection, it must be emphasized that relief actions undertaken without consent are not completely unprotected. Measures taken by the occupying power to prevent or stop such operations have to respect certain limits which will be discussed below.

If consent is unlawfully withheld, the situation is different. If a relief operation undertaken by a State or intergovernmental organization is conducted in the absence of a consent which had to be granted, a first question to be considered is whether conducting such operation constitutes a lawful countermeasure against the illegal act of withholding consent (Art. 22, 49 *et seq.* ILC Articles on the Responsibility of States – ARS). Yet according to Art. 49 (1) ARS, a countermeasure may only be taken "in order to induce (the State having committed an internationally wrongful act) to comply with its obligations ..." This possibility will be discussed in section 6 below. First, the legal status of a relief operation has to be considered even where it does not constitute a "countermeasure" in the sense described.

If the relief operation is undertaken by a non-governmental actor, the justification as countermeasure is not possible anyway. But if the occupying power takes a measure to prevent the operation, that measure is internationally unlawful despite the fact that the necessary consent had not been granted. For in order to justify the measure, the occupying

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[21] See already Human Rights Committee, International Covenant on Civil and Political Rights, Concluding observations on the second periodic report of Israel, 5 August 2003, Doc. CCPR/CO/78/ISR, para. 16.

power would have to rely on an act, namely withholding consent, which itself is unlawful. Under these circumstances, preventing the operation would be equivalent to enforcing an illegal act, which is unlawful. No right can be derived from an illegal act. Such preventive measure would at least constitute an abuse of rights. The measure would constitute the exercise of a right given for a legitimate purpose for a purpose which is not legitimate. This is an arbitrary and therefore "abusive exercise" of the right.[22] The old Roman law adage has become a general principle of law: *nemo auditur allegans turpitudinem suam* (no one is heard relying on his own turpitude). This principle is well established in international arbitral jurisprudence.[23]

Although non-governmental organizations undertaking relief actions are not the direct addressees of these international legal rules, they are the beneficiaries thereof. In particular, the States where such organizations are incorporated or which otherwise sponsor such relief actions, and in addition all States which are entitled and obliged to ensure respect for the Geneva Conventions[24] may claim on their behalf and for their benefit that the occupying power respect these rules.

In addition, it must be taken into account that refusing a consent which the State is under an obligation to grant amounts to an unjustified denial of certain human rights, as explained above. Consequently, preventing a relief operation which the State was under an obligation to allow and facilitate also constitutes such a denial.

5.4. Treatment of relief workers

The provisions of GC IV concerning relief are formulated in a way which relates to the consignment of goods only. But relief in this sense is not limited to such consignments, as is indicated by the words "in particular" in Art. 59 (2) GC IV. It has become a widespread practice, which amounts to the formation of a rule of customary international law, that relief operations are conducted by relief personnel, be it foreign or local. In the case of foreign relief operations, a duty of admission and working permission is reasonably implied in the duty to facilitate relief. The same duty also comprises a right to employ local personnel. This also applies to the protection of both foreign and local relief personnel. As to foreign relief personnel,[25] this rule is recognized and concretized by Art. 71 AP I, which contains details balancing the interests of relief operations on the one hand and the interests of the occupying power (or of the State where the relief operation takes place) on the other. This

[22] A. Kiss, 'Abuse of Rights', MN 6 and 12, MPEPIL (note 1).

[23] C. Binder/C. Schreuer, 'Unjust Enrichment', paras. 36 and 37, MPEPIL (note 1). For the application of the principle in the field of human rights, see C. Tomuschat, 'International Covenant on Civil and Political Rights (1966)', para. 25, MPEPIL (note 1).

[24] See below 6.2.

[25] Although the text of the provision does not expressly distinguish between foreign and local personnel, the focus of its content is on foreign personnel.

rule is not binding on Israel as a matter of treaty law. But the rule can be considered as customary law[26] and also as a reasonable interpretation of Art. 59 GC IV.

The rule that it is essential for relief operations to be operated or accompanied by relief personnel has also been formulated by the UN General Assembly:[27]

> "The General Assembly ...
>
> Calls upon all governments and parties in complex humanitarian emergencies, in particular in armed conflict and post-conflict situations, in countries where humanitarian personnel are operating, in conformity with the relevant provisions in international law and national laws, to cooperate fully with the United Nations and other humanitarian agencies and organizations to ensure *the safe and unhindered access of humanitarian personnel as well as supplies and equipment* in order to *allow them to perform efficiently their task* of assisting the affected civilian population ..."

This means in particular:

Admission formalities including visa may be required. But they must be handled in a way which does not compromise the viability of relief actions. This is implied in the duty to "facilitate" relief schemes (Art. 59 GC IV). In particular, visa requests must be handled swiftly. Visa may not be denied on arbitrary grounds.[28] Abusive controls at entry and checkpoints are prohibited.

According to Art. 71 AP I and the corresponding rule of customary law, relief personnel must be "respect and protected". This means, on the one hand, that such personnel must not be attacked or otherwise harassed or intimidated. On the other hand, it also means that the occupying power must allow them to fulfil their tasks and may not unnecessarily prevent them from discharging their functions.[29] This includes freedom of movement.[30] Only in cases of "imperative military necessity" may their movement be temporarily restricted. The mission of relief workers may, however, be terminated if they engage in activities outside their humanitarian mandate. The protection of local personnel is at least implied in the occupying power's duty to facilitate the operation.

Certain general rules also have to be respected in relation to relief personnel. They may not be attacked as they are civilians. This applies also in case of unauthorized relief operations or in the case of an operation whose mandate was terminated.

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[26] ICRC/Henckaerts/Doswald-Beck, *op.cit.* note 15, p. 200 *et seq.*
[27] Resolution 58/114, 17 Dec. 2003, OP 10, emphasis by the author.
[28] ICRC/Henckaerts/Doswald-Beck, *op.cit.* note 15, p. 202.
[29] Bothe, in Bothe/Partsch/Solf, *op.cit.* note 17, p. 490.
[30] ICRC/Henckaerts/Doswald-Beck, *op.cit.* note 15, p. 200.

Personnel belonging to intergovernmental organizations may also enjoy immunities if they fall into the relevant categories of applicable treaties.[31]

Human rights law also applies relating to the treatment of relief workers by the occupying power. This applies to both foreign and local personnel. It is of particular relevance for the question of detention. Art. 9 and 10 ICCPR have to be observed. "Arbitrary" arrest and detention are prohibited, subject to a derogation according to Art. 4 ICCPR.[32] The question of "arbitrariness" may be answered differently where a relief action takes place without consent, but any measure taken against personnel of unauthorized relief operations must respect the principles of necessity and proportionality which govern any limitation of human rights.

5.5. Request of consent and forms thereof

According to Art. 59 GC IV, the duty to grant consent relates to "relief schemes". This may include, as the case may be, individual consignment or operations. But the term "schemes" is broader than that. It also covers a broader plan of relief operations which can be submitted to the occupying power, requesting the consent thereto. This includes the possibility that several relief organizations together submit such a scheme. A good example of such a "scheme" is the "Strategic Response Plan" published by UNOCHA, and shared with the competent authorities of the occupying power, which contains an assessment of relief needs, a systematic concept of action to be taken to respond to those needs and a list of concrete projects, including information on the organizations undertaking them.[33] As a matter of principle, it is not, at least not necessarily, a violation of the occupying power's duty to facilitate a relief scheme if it asks for more details concerning the plan. Whether or not a refusal is arbitrary or not if these details are not given depends on the circumstances of the situation. But given the degree of detail given in the said project list, it would be difficult for the occupying power to argue that this is an insufficient basis for a decision to accept the relief projects so listed. Furthermore, the occupying power must exercise restraint in asking for information which the relief organization may or even must legitimately withhold to safeguard fundamental rights of the beneficiaries. Asking for such information may amount to an unlawful impediment of humanitarian relief actions.

The form of consent is not specified in GC IV nor in AP I. Therefore, it can be express (which is of course the preferred form), but also implicit. As in any case of declarations construed by implication, this involves questions of interpretation concerning the relevant behaviour,

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[31] In particular the Convention on the Privileges and Immunities of the United Nations, 13 Feb.1946, to which Israel is a party. Israel is not a party to the Convention on the Privileges and Immunities of Specialized Agencies, 21 Nov. 1947, nor to the Convention on the Safety of United Nations and Associated Personnel, 9 Dec. 1994. This question cannot be dealt with in detail in the framework of the present Opinion.

[32] On the question of the state of emergency, see Human Rights Committee, *loc.cit.* note 18, para. 10.

[33] http://www.ochaopt.org/documents/srp_2015.pdf. The list is included in the document http://fts.unocha.org/reports/daily/ocha_R3_A1067__1_April_2015_(03_03).pdf.

including the interpretation of silence. The application of the old Roman law adage "*qui tacet consentire videtur, si loqui potuit ac debuit*" (who is silent appears to consent if he could have and should have spoken) is uncertain. Yet there are situation where silence must be interpreted in good faith as consent. A special circumstance supporting such conclusion in the present case is the fact that the proposal comes from a United Nations agency. All States are under a general duty to cooperate with the United Nations (Art. 2 nos. 2 and 5 of the Charter). It would be contrary to this general obligation if a State just remained silent although it had objections against a proposal submitted to it in the exercise of the functions of the UN in conformity with the Charter.

5.6. Cooperation with the occupying power

The whole situation of relief operations, and in particular the consent requirement, implies that there must be some intercourse between the organizations providing relief and the occupying power. Relief operations are not subversive or clandestine actions. In particular, the obligation to agree does not mean that consent must be given without questions being asked. There may be negotiations between the organizations providing relief and the occupying power. Such negotiations must be conducted in good faith by both sides. Whether and to what extent one or the other side may make concessions on questions of principle is first of all a question of evaluating chances of success in these negotiations. It is not the task of the present legal opinion to speculate about relevant circumstances in this context.

Yet there is also the legal question whether such concessions may mean foregoing a legal position which an organization has so far taken by refusing to accept certain Israeli practices as legal. In this respect, too, a distinction must be made between positions taken or declaration made by States or intergovernmental organizations on the one hand and attitudes of non-governmental organizations, on the other. Only subjects of international law (i.e. States or intergovernmental organizations) are legally empowered to modify, through their behaviour, an international legal relationship. It is only them whose attitudes could possibly be understood as amounting to acquiescence and to recognizing the legality of certain Israeli practices and thus prevent the negotiating party from treating these practices as illegal in the future.

However, the fact alone that negotiations are conducted and that some concessions are made in these negotiations cannot be understood as such recognition. Such recognition should not be assumed easily. The purpose of such negotiations or even cooperation is to facilitate humanitarian relief. It would be contrary to the purpose and spirit of the treaty provisions designed to promote relief operations if the intercourse between the giving organizations and the receiving State were construed as legal impediments for such relief because it would be interpreted as involving a recognition which the negotiating party is unwilling or unable to give. The application of humanitarian rules shall not affect any status

questions. This is a principle of humanitarian law which is best expressed in the final paragraph of Art. 3 common to the GC:

> "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

The same rule underlies Art. 70(1) 2nd sentence:

> "Offers of such relief shall not be regarded as interference in the armed conflict ..."

The holding of the ICJ in the *Namibia* case points in the same direction: An obligation not to recognize as lawful an unlawful situation

> "should not result in depriving the people of Namibia of any advantages derived from international cooperation."[34]

The conclusion to be drawn is clear: humanitarian action in favor of the victims of armed conflict or belligerent occupation may not be hindered by status considerations, in particular by the fear that such action could be (mis)understood as amounting to a recognition of, or acquiescence with, an unlawful act or situation.

In the case of negotiations between non-governmental organizations and the occupying power, there is no such question of recognition having international legal effects.

6. The position of third States

Regarding the possible role of third States in respect of Israeli practices preventing or restraining relief, two questions have to be distinguished:

- first, States may be affected because Israeli measures, in particular demolitions, affect their property or, in the case of measures against relief workers, their nationals;
- second, the general role of third States, i.e. States not parties to a conflict, in ensuring respect for international humanitarian law.

6.1. States affected in their individual rights

Where objects, in particular buildings, are unlawfully demolished which are the property of a State having provided the construction as humanitarian assistance, or the property of its nationals, this demolition constitutes an internationally wrongful act committed by Israel vi-à-vis the State in question and entails the corresponding consequences.

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[34] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion of 20 June 1971, para. 125.

If relief workers are treated in a way incompatible with the rules explained above, this constitutes an internationally wrongful act committed by the Occupying Power against the State of which the relief workers are nationals.

In both cases, the general rules on the consequences of internationally wrongful acts apply.

6.2. Ensuring compliance with international humanitarian law

In its Advisory Opinion concerning the Construction of a Wall in the Occupied Palestinian Territory, the ICJ clearly formulated the basic principles which have to guide the action by third States to ensure and promote compliance by Israel with the basic legal rules governing the situation of occupation, including the rules on access for humanitarian relief (Reply D to the question put by the General Assembly):

> "All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."

According to the Court, the basis for these obligations of all States, i.e. States which are not parties to the Palestinian conflict, is twofold:

1. The majority of the relevant norms create obligations *erga omnes.*
2. Art. 1 common to the Geneva Conventions enjoins all Sates to respect and to ensure respect for the Conventions.

As practically all States are parties to the Geneva Conventions, the scope of application of the two principles is practically equal.

In its opinion, the Court does not elaborate on the question what measures States could take in order to fulfill this obligation. It only says that they must respect the Charter and international law. This excludes at least the use of force. But positively speaking, what kind of measures are to be envisaged? On an abstract level, the measures to be envisaged are those which have the potential of inducing Israel (and where necessary the Palestinian Authority) to comply with the applicable rules. The following lines are a kind of catalogue of such measures which States must consider in fulfilling their duty to ensure respect of the

Geneva Conventions, in particular by reacting against the establishment of unlawful impediments for humanitarian relief:[35]

- Political dialogue,
- Public statements,
- Non-public demarches,
- Unilateral restriction, countermeasures,
- Evocation of State responsibility,
- International dispute settlements,
- International cooperation.

Political dialogue: In the reality of the international system, both development and application of international law are determined by a political discourse between relevant actors, and only to a limited extent on high handed enforcement. This is the basis of the functioning of the UN system. A responsible use of this discourse is necessary. The duty to ensure the respect of the Conventions implies a duty to use the potential of such discourse. Especially those States which, for historic or political reasons, have the chance of being listened to by parties to a conflict are called upon to use this opportunity, be it bilaterally or in appropriate fora.

The discourse will not always take the form of a dialogue. Some other forms are described below.

Public statements: Political dialogue, i.e. a discourse between parties listening and talking to each other, is not always possible. The conflict in and around Palestine frequently is an example of this phenomenon. In such situation, violations of IHL must trigger public statements by third States. It is a violation of the said duty to ensure respect to remain silent in front of significant breaches of the Conventions. This is an obligation which is honored in practice by many States, perhaps not by enough States.

Non-public demarches: A verbal reaction to violations must not necessarily be public. There are situations where non public demarches may be more effective. Public demarches may stiffen the reaction by the addressee, which non public demarches will not or rarely do. But due to a certain lack of transparency which is necessarily involved in this instrument to ensure compliance, its effectiveness is somewhat speculative.

Unilateral restrictions, countermeasures: Deprivation of certain advantages is a classical reaction to violations of the law, in modern terminology "counter-measures". Such measures include restraints on financial transactions performed by the target State or by persons acting for the target State, travel restrictions for such persons, import or export restrictions. Such restrictions do not pose legal questions where the target State or person has no legal

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[35] The list is to a certain extent inspired by the European Union Guidelines on promoting compliance with international humanitarian law (IHL), OJEU 2005/C 327/04.

claim to the advantage it/he or she is deprived of (retorsion in traditional terminology). Where there is a legal entitlement to that advantage, the countermeasure constitutes the violation of an international obligation unless rendered lawful by the relevant rules of the law of State responsibility. Accordingly, countermeasures may only be taken by the injured State under the conditions set out in Arts. 49 et seq. ILC ARS. Common Art. 1 of the GC does not exempt third States wishing to react to violations of the GC from this limitation. This is also implied in the holding of the ICJ, quoted above, that measures taken by States pursuant to Art. 1 common to the GC must respect international law.

Thus, countermeasures involving the non-performance of an obligation binding the State taking the measure are lawful only in the case of *erga omnes* obligations in the sense of Art. 48 para. 1 ARS being violated. They are limited to measures defined in Art. 48 para. 2. Generally speaking, the GC contain *erga omnes* obligations. Thus, this type of counter-measure taken by third States is as a matter of principle lawful.

Conditionality of trade and assistance: A related form of measures reacting to, or trying to prevent, IHL violations is the conditionality of trade or assistance: A particular item may not be traded if it can be anticipated that it will/might be used for IHL violations. A certain aid is only granted if it is associated with measures taken to ensure respect of IHL. This is of particular relevance for arms exports or military aid, but not limited to it.

As to arms exports, an important new treaty prescribing this type of conditionality is the Arms Trade Treaty of 2 April 2013. Its Art. 6 para. 3 reads:

> "A State shall not authorize any transfer of conventional arms ... , if it has knowledge at the time of authorization that the arms ... would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party."

A similar principle is formulated by the EU in the Council Common Position 2008/944/CSFP of 8 December 2008 defining common rules governing control of exports of military technology and equipment. The Common Position establishes eight criteria for export controls, among them

> "Criterion Six: Behaviour of the buyer country with regard to the international community, as regards in particular its ... respect for international law.
>
> Member States shall take into account, *inter alia*, the record of the buyer country with regard to:
>
> ...
>
> (b) its compliance with ... international humanitarian law."

Evocation of State responsibility: State responsibility may be invoked, as a matter of principle, by the injured State. It may be invoked by a State which is not injured only in the case of the violation of an *erga omnes* obligation, and only as regards particular consequences of the wrongful act. In the case of a violation of the law of armed conflict, the injured State is as a rule the party to the conflict to the detriment of which that violation is committed. This means that the claim of third States is limited to the consequences of the unlawful act which are enumerated in Art. 48 para. 2 ARS: cessation of the illegal acts, assurances and guarantees of non-repetition and reparation in favor of the injured State and/or the beneficiaries of the obligation breached. Accordingly, all States have the right to demand compensation for victims of violations which occurred in the OPT, for instance persons whose houses have unlawfully been destroyed or who have been unlawfully evicted from their land. By virtue of common Art. 1 GC, there is an obligation to exercise this right.

International dispute settlement, institutions: The examples of possible measures to be taken by third States suffice to show that there is a potential for controversy between third States and the occupying power. What institutions can be used to solve these controversies? The usual procedure used in international practice, namely negotiations, is of course the first option. There are other voluntary procedures which may be used.

Israel has not recognized the obligatory jurisdiction of the ICJ under the optional clause of Art. 36 ICJ Statute. Its *ad hoc* acceptance of the ICJ in a concrete case is highly improbable. If there can be a judicial settlement of a dispute between Israel and a third State, resort to arbitration would probably be a solution, if any, because this can be tailor made for the interests which parties to the litigation would like to protect and preserve.

Fact-finding or inquiry is an established element of international dispute settlement. As Israel is not a party to AP I, the obligatory competence of the International Humanitarian Fact-finding Commission established pursuant to Art. 90 AP I does not apply. But its jurisdiction can be recognized *ad hoc* by any party to a conflict, and its rules provide for sufficient flexibility to design a procedure fitting the interests of all parties.

Inquiry is also a dispute settlement procedure provided for by the GC (Arts. 132 GC III, 149 GC IV). But the inquiry commission has to be established in each particular case, which is the disadvantage of this procedure in comparison with Art. 90 AP I, where there is a commission already in existence.

International cooperation: Various procedures have been shown which have the potential to induce parties to a conflict, in particular an occupying power or a detaining power, to comply with IHL. These procedures or tools are options for each specific "third" State. But they will be more effective if they are not just used by one State alone, but by many States together. This is the case for international cooperation in devising or using the tools described.

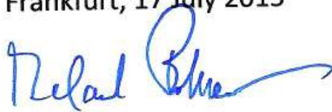
Conclusion: There is a great variety of measures which third States can take in order to induce the Occupying Power to comply with international humanitarian law, including the

law relating to humanitarian assistance which is the object of the present expert opinion. Some of these tools to ensure compliance with IHL are formal procedures, others are informal. What matters is the appropriate mix of their use. Their effectiveness deserves to be made the object of further research. Their use, although – as has been shown – to a large extent obligatory, still depends on political will.

7. Conclusion

International law provides a solid basis for humanitarian assistance. The core of the legal issues is the general obligation of the Occupying Power to provide for the wellbeing of the population of the occupied territory. This rule is also the rationale for the basic obligation of the Occupying Power to accept and facilitate relief operations. Admittedly, the Occupying power has security interests which it may safeguard by appropriate measures. But it may not do so in a way which compromises the said basic duty to accept and facilitate relief actions. Doubts about the legal situation must be solved taking this fundamental principle into account. Third States have various possibilities to induce the Occupying Power to comply with its obligations – which is an important humanitarian asset.

Frankfurt, 17 July 2015



Prof. Dr. Michael Bothe