

Respect for and Protection of Humanitarian Assistance under International Humanitarian Law

Specific rules of international humanitarian law (IHL) protecting humanitarian personnel and their operations are applicable in the context of the non-international armed conflict in Afghanistan.

This note considers three relevant and related concepts:

- Victims' rights to receive assistance
- Obligations on parties to a conflict to provide or facilitate assistance
- Protection of humanitarian organizations, their personnel and property

IHL applicable to international armed conflicts contains relatively detailed treaty provisions on the facilitation of humanitarian relief.¹ In non-international armed conflict, such as the current armed conflict in Afghanistan, the applicable rules of IHL can be found in Article 3 common to the four Geneva Conventions, the Second Additional Protocol to the four Geneva Conventions and customary international law.² The rules of IHL discussed below are binding on both State and non-State parties to the conflict.

1. The right to assistance and the obligation to provide aid

Right of those in need to receive assistance

IHL is based on a balance of the principle of humanity and military necessity. It emphasizes the right of civilians and other protected persons to be treated humanely, and to receive medical care and humanitarian assistance essential to their survival. Examples of this include the provisions in Article 3 common to the four Geneva Conventions that "[p]ersons taking no active part in the hostilities (...) shall in all circumstances be treated humanely (...)" and "[t]he wounded and sick shall be collected and cared for"; the provision in the second Additional Protocol that relief actions "shall be undertaken" whenever a population is in need;³ as well as the rule that in the case of displacement, all possible measures must be taken in order that the civilians are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.⁴

Obligation to provide and/or facilitate assistance

The State in the territory of which the conflict is taking place or the party that controls a territory has a corresponding duty to either meet the vital needs to the population or to consent to and facilitate a humanitarian relief operation. Additional Protocol II to the Geneva Conventions (Art. 18(2)) provides that:

- If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

Sufficient state practice exists for this rule to be considered customary IHL in non-international armed conflicts:

- The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to the their right of control.⁵

¹ See for example, Fourth Geneva Convention 1949, Arts. 10, 11, 13, 30, 38, 39, 55, 56, 59-63, 81, 110, 111, 142, and particularly 23; First Additional Protocol to the four Geneva Conventions (AP I), Arts. 17, 69, 70, 71.

² The current armed conflict in Afghanistan is a non-international armed conflict. The applicable rules of IHL are therefore found in Common Article 3 to the four Geneva Conventions, the second Additional Protocol 1977 to the Geneva Conventions (acceded to by Afghanistan in 2009) and customary IHL applicable to non-international armed conflicts. The legal protection of humanitarian personnel falls within the scope of both international and national law. This paper examines IHL provisions only, and not international human rights provisions, international standards, United Nations documents, nor the domestic law of any country.

³ Second Additional Protocol to the four Geneva Conventions (AP II), Art. 18(2), discussed in Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, 2005, p. 199 (ICRC CLS).

⁴ ICRC CLS, Rule 131.

⁵ ICRC CLS, Rule 55.

In practice, therefore, the parties to the conflict, if unable to meet the needs of the civilian population themselves, must allow humanitarian relief to be provided, on the condition that it is impartial and provided according to need/without discrimination.⁶ In other words, the State has primary responsibility but can be assisted or substituted by humanitarian organizations.⁷ It is in this sense that Common Article 3 to the Geneva Conventions provides for the right of an "offer of services" of an "impartial humanitarian body" to the parties to the conflict, although being an offer, this does not necessarily oblige the party to the conflict to accept. Offers of assistance fulfilling the conditions required by IHL (humanitarian, impartial in character and conducted without any adverse distinction) shall not be regarded as interference in the armed conflict or as hostile acts.⁸

Consent

While such humanitarian action remains subject to the consent of the State or party concerned, consent should not be unreasonably withheld or refused on arbitrary grounds.⁹ Indeed, the concerned party must consent to and facilitate humanitarian assistance which is impartial in character and conducted without adverse distinction, where failure to do so would risk causing starvation or otherwise threaten the survival of the civilian population.¹⁰ While consent cannot be withheld for arbitrary reasons, the party to the conflict may exercise control over the relief action.¹¹ In addition, humanitarian relief personnel must respect domestic law on access to territory and must respect the security requirements in force.

Facilitation and freedom of movement

Once consented to, "facilitation" of the humanitarian relief and its non-obstruction is a necessary corollary, to ensure that the provision of relief is effective and can be carried out safely.¹² Customary IHL applicable in the non-international armed conflict in Afghanistan provides that:

- The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted.¹³

2. The protection of humanitarian personnel taking part in relief operations

Humanitarian personnel as civilians

Provided the personnel of a humanitarian organisation meet the definition of civilian, and are not directly participating in hostilities, they benefit from the fundamental principle of distinction between civilian and combatant under IHL. Persons who are not, or are no longer, participating actively in the hostilities are protected from attack and must be treated humanely in all circumstances.

Respect and protection of humanitarian relief personnel

The general rule protecting civilians is strengthened by more specific rules of IHL relating to the protection of staff taking part in relief operations, and those authorized to use the Red Cross/Red Crescent emblem.¹⁴

⁶ In other words, on the condition that that the relief "provides every guarantee of non-intervention" (see ICRC Commentary to AP II, Art. 18(2), para. 4882). IHL generally defines humanitarian organizations as those that work in a neutral and impartial way, without any adverse distinction in their operations. The definition of "humanitarian action" is important, and a distinction must be made between impartial humanitarian relief on the one hand, and political or military action with humanitarian objectives, on the other hand.

⁷ ICRC Commentary to AP II, Art. 18(1), para. 4871 and Art. 18(2), para. 4878.

⁸ ICRC, "Respect for and Protection of the Personnel of Humanitarian Organizations", Preparatory document drafted by the International Committee of the Red Cross for the first periodical meeting on international humanitarian law Geneva, 19 - 23 January 1998, at para II, 2.1(b).

⁹ ICRC CLS, p. 197. Note that depending on the factual situation, a humanitarian organisation may need the consent of the parties in control of the areas in question and of the sovereign State. Note also that the ICRC Commentary AP II, Art. 18(2), para. 4884 states that "[i]n exceptional cases when it is not possible to determine which are the authorities concerned, consent is to be presumed in view of the fact that assistance for the victims is of paramount importance and should not suffer any delay."

¹⁰ Otherwise the lack of consent risks falling foul of the prohibition on using starvation as a method of combat, and the duty to protect objects indispensable to the survival of the civilian population set out in Art. 14 of AP II. ICRC Commentary to AP II, Art. 18(2), para. 4885. See also discussion in ICRC CLS, p. 197. See also discussion in Rebecca Barber, *Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law*, IRRRC, June 2009, Vol. 91, No. 874, 371-397.

¹¹ ICRC CLS, p. 197.

¹² ICRC Commentary to AP II, Art. 18(1), para. 4888.

¹³ ICRC CLS, Rule 56.

Customary IHL applicable in the non-international armed conflict in Afghanistan provides that:

- Humanitarian relief personnel must be respected and protected.¹⁵
- Objects used for humanitarian relief operations must be respected and protected.¹⁶

The ICRC study on the rules of customary international law explains in relation to the obligation to respect and protect humanitarian relief personnel that "[t]he safety and security of humanitarian relief personnel is an indispensable condition for the delivery of humanitarian relief to civilian populations in need threatened with starvation."¹⁷ Going one step further, therefore, States should also take effective, preventive measures to reduce risks that humanitarian personnel may face. This includes having the required provisions criminalizing IHL violations in domestic law, and taking appropriate action to prosecute perpetrators in case of alleged violations of international law.¹⁸

Red Cross/Red Crescent Emblem

Certain humanitarian relief personnel, notably representatives of the Red Cross and Red Crescent Movement and civilian medical personnel, units and transports, are entitled to wear the distinctive emblem, which aims to identify them as protected persons. Attacks directed against medical personnel and objects displaying the distinctive Red Cross, Crescent or Crystal emblems in conformity with international law are prohibited.¹⁹

One commentator has explained that "[i]t should also be noted that relief personnel unaffiliated with the Red Cross and Red Crescent Movement are in principle not entitled to use the red cross/red crescent emblem as a protective device. The problem of the identification of the plethora of non-governmental organizations present in conflict situations and of the norms to be adopted in this respect thus remains unresolved."²⁰

War Crimes

Under the Statute of the International Criminal Court, intentionally directing attacks against the following persons or property are war crimes in non-international armed conflicts:

- the civilian population or against individual civilians not taking direct part in hostilities;
- buildings, materials, medical units and transport and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations (as long as they are entitled to the protection given to civilians or civilian objects under IHL); and
- hospitals and places where the sick and wounded are collected (provided they are not military objectives).²¹

Conclusion

To sum up the main points of the above note in to one short statement, the following language could be used:

Under IHL, humanitarian relief personnel and objects used to carry out humanitarian tasks must be respected and protected. The parties to the conflict must take all necessary measures to ensure their safety, and guarantee their freedom of movement.

¹⁴ This paper does not cover the rules on the protection of personnel and objects involved in a peacekeeping mission, civil defence staff, the respect for medical personnel, units and transports, the protection of journalists engaged in professional missions in areas of armed conflict, nor UN personnel protected under the Convention on the Safety of UN Personnel and its Optional Protocol.

¹⁵ Rule 31 of the ICRC CLS.

¹⁶ Rule 32 of the ICRC CLS.

¹⁷ ICRC CLS, p. 105.

¹⁸ See discussion in A. Faite, Legal considerations regarding the protection of humanitarian workers in the filed, Extract from the Finish Red Cross publication "Secure 02", June 2002, p.39.

¹⁹ ICRC CLS, Rule 30. Note that the Emblem is used to help identify protected persons but that those persons are anyway protected under IHL.

²⁰ *Supra*, note 8.

²¹ ICC Statute, Arts. 8(2)(e)(i)-(iv).

Annexes

Annex 1: Selected Relevant Rules of IHL Applicable in Afghanistan:

Civilians are protected against attack, unless and for such time as they take a direct part in hostilities. ICRC Customary Law Study, Rule 6. See also Rules 1, 5, 7, 9, and 10.

Medical personnel, units and transport exclusively assigned to medical duties and uses must be respected and protected in all circumstances. They may not be the object of attack and their work or safe passage should not be unnecessarily impeded or obstructed. They lose their protection if they commit or are being used to commit acts harmful to the enemy outside their humanitarian function. See ICRC Customary Law Study, Rules 25, 28, 29, 30.

Humanitarian relief personnel must be respected and protected. ICRC Customary Law Study, Rule 31.

Objects used for humanitarian relief operations must be respected and protected. ICRC Customary Law Study, Rule 32.

The use of starvation of the civilian population as a method of warfare is prohibited. ICRC Customary Law Study, Rule 53.

The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control. ICRC Customary Law Study, Rule 55.

The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted. ICRC Customary Law Study, Rule 56.

If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned. Second Additional Protocol 1977, Art. 18(2)

(...) An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict. (...) Article 3, Common to the four Geneva Conventions of 1949

(...) The wounded and sick shall be collected and cared for. (...) Article 3, Common to the four Geneva Conventions of 1949

The wounded, sick (...) must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones. ICRC Customary Law Study, Rule 110.

Each party to the conflict must take all possible measures to protect the wounded and sick against ill-treatment, and against pillage of their personal property. ICRC Customary Law Study, Rule 111.

In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated. ICRC Customary Law Study, Rule 131.

Annex 2: Selected relevant academic papers:

Rebecca Barber, Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law, IRRRC, June 2009, Vol. 91, No. 874, 371-397

Alexander Faite, Legal considerations regarding the protection of humanitarian workers in the field, Extract from the Finish Red Cross publication "Secure 02", June 2002, available at <http://www.icrc.org/eng/resources/documents/misc/5s3dya.htm>

David Fisher, Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: a Comparative Analysis, IRRRC, June 2007, Vol. 89, No. 866, 345-372

ICRC, Respect for and Protection of the Personnel of Humanitarian Organizations, 19.01.1998, Preparatory document drafted by the ICRC for the first periodical meeting on international humanitarian law, Geneva, 19-23 January 1998

Kate Mackintosh, Beyond the Red Cross: the Protection of Independent Humanitarian Organizations and their Staff in International Humanitarian Law, IRRRC, March 2007, Vol. 89, No. 865, 113-130

Ruth Abril Stoffels, Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps, IRRRC September 2004, Vol. 86, No. 855, 515-546