40th Round Table on Current Issues of International Humanitarian Law

"The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives"

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Shedding light on the rules on humanitarian access[1]

How can the victims of humanitarian disasters, natural or man-made, be reached? This is a key question for the survival of victims!

I am grateful to the organizers of the Conference to have tasked me with trying to answer it. This subject has been dear to me for more than 40 years. At the CDDH 1974/77, I had the privilege of being involved in the negotiations of the relevant provisions of the Additional Protocols. Immediately after the Conference, I had to present the results here in Sanremo. Now I am back: the criminal always comes back to the place of his misdeeds. Then and now, the same fundamental problems have been vexing us. They shaped the negotiations, and they still are the object of political controversy.

The basic humanitarian interest pursued by a number of States in the negotiations was free and unrestrained access for relief operations in favour of the victims of armed conflicts. A right to provide and a right to receive humanitarian relief was the result desired by those States. But there were restraining interests fighting for restraints on these rights, based on the fear that humanitarian relief might have an undesirable impact on the armed conflict, and might unduly enhance one party's chance to win or capacity to resist.

Thus, a compromise had to be found: there is, on the one hand, a right to receive relief or to have access to the victims. Relief operations "shall be undertaken" (Art. 70 AP I). But the right is limited. The access was made "subject to the agreement" of the relevant actors. Two fundamental questions follow:

- Whose agreement is necessary?
- Is there a free discretion to refuse that agreement?

As to international armed conflicts the first question is clarified by the formula: "subject to the agreement of the Parties concerned in such relief actions". This means different rights or obligations for different addressees, which are "concerned":

[1] Version as orally delivered at the Sanremo Round Table.

- the State of origin of an operation,
- the transit State where an action has to pass through,
- the receiving State, i.e. the State controlling the territory where relief is provided.

All three kinds of State pose particular problems:

- The State of origin: is it, for example, internationally lawful for a State to refuse an agreement by prohibiting an NGO wishing to organize a relief operation in a country which is ruled by an organization accused of being terrorist?
- The transit State: what is the scope of duties of cooperation imposed upon that State in order to facilitate relief operations?
- The receiving State: only the State *de facto* controlling the territory where relief is provided or distributed is "concerned". The requirement of an agreement does not give a veto power to the other party to the conflict.

What about NIAC? Art. 18 AP II modifies the corresponding text of Art. 70 AP I to: "subject to the agreement of the High Contracting Party concerned". Some authors maintain that this is a clear text, meaning: The agreement of the government of the State on the territory of which a NIAC takes place is necessary. That government is concerned even if the area where relief is provided is not controlled by that government, and only the agreement of that government is required.

Yet it has to be noted that the text resulting from earlier phases of the negotiating process contained a formulation similar to that of AP I: "party or parties concerned", which also included the non-State party. That latter element disappeared due to an amendment adopted at the very last minute. That was due to the drafting decision not to mention the non-State party in AP II, a decision based on conference politics, which legally speaking made no sense. It is clear that for a number of practical reasons the consent of the non-state party is necessary. In terms of treaty interpretation: is it possible to consider a text, which obviously does not make sense, as being "clear"?

The second problem related to the final text of Art. 18 AP II is whether or not the agreement of the government in place is necessary even for relief operations which do not pass through, and are not destined to, parts of the State territory no more controlled by that government. That issue has been particularly controversial in relation to Syria where it was possible to send relief from the Turkish border to areas held by opposition forces without touching areas controlled by the Assad forces, so called "cross border operations". The view that the agreement of the Assad government was necessary interprets the word "concerned" in Art. 18 as relating to the formal territorial sovereignty, and not to the *de facto* control over the area where relief operations are passing through or where relief is delivered. Yet for the text adopted during the earlier phases of the drafting process, the

latter meaning of "concerned" was valid, i.e. the same as in AP I. If the text is now understood differently, it means that by adopting the new formulation, by replacing a plural by the singular, the Conference changed the meaning of the word "concerned" from one moment to the next. Possible, but "clear"?

No, Art. 18 AP II is not clear as to the question of whose agreement is necessary. In the case of Syria, the issue was finally addressed by the Security Council (SC) which authorized "cross border operations" for specific border crossings and specific times (Resolution 2165 (2014), OP 2). If the word "concerned" in AP II was understood as relating to the *de facto* control of the relevant area, the SC resolution meant a clarification and to a certain extent a restriction of Art. 18 AP II. If the consent requirement relates to the entire national territory, the resolution created a new right for relief operations which did not exist independently of the resolution. There were voices in the Security Council debate which suggested the latter version yet I think the question remains open. This is where we stand regarding the question of whose agreement is necessary for relief action in the case of NIAC.

The second fundamental issue of interpretation raised by both Art. 70 AP I and Art. 18 AP II is whether the party whose agreement is necessary has an unlimited discretion to refuse it. In this connection, it has to be emphasized that the relevant parties are under a duty to allow relief operations. Operations fulfilling certain criteria "shall be undertaken". There is thus a certain tension in the text between two elements: "obligation" on the one hand, and "requirement of agreement" on the other. A reasonable interpretation of the provision must accord a practical significance to both elements of the text. This is the rationale of the interpretation already put forward, and not contested, in the debate of the Conference and then maintained in the ICRC Commentary. It has now become generally accepted in international practice: the agreement may not be refused in an arbitrary manner.

This rule entails two further questions:

- What constitutes an "arbitrary" refusal?
- What is the consequence if the agreement is unlawfully withheld?

Some clarifying light is shed on the first question by a recent document elaborated and published with UN support, but is not an official UN document, which shows the politically delicate character of the issue. The conclusions are published under the name "Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict" and are based on two background papers co-authored by two well-known experts in the field, namely, Dapo Akande and Emanuela-Chiara Gillard. The "Conclusions" convincingly list the following criteria which provide a useful concretization of the prohibition of arbitrary refusal:

> Consent is withheld arbitrarily if it is withheld:

- in circumstances that result in a violation of obligations under international law with respect to the civilian population in question, including, in particular obligations under international humanitarian law and international human rights law, or
- in violation of the principles of necessity and proportionality; or
- in a manner that is unreasonable or that may lead to injustice or lack of predictability, or that is otherwise inappropriate.

Note that the final clause equals “arbitrary” to “inappropriate”. Both words are vague and general.

As to the second question, a distinction must be made between a formal legal and a practical consideration: If an operation is conducted without the necessary agreement, claiming that the refusal was unlawful, this is simply dangerous as the State concerned will enforce its view that the operation is illegal, regardless of the fact that other actors consider that State’s behaviour to be illegal. From the point of view of international law, however, if the State enforces its illegal refusal, it means that it must rely on its own illegal behaviour to enforce its position. There is a general principle of law that no State may derive a right from its own unlawful behaviour. If some Latin is permitted: “*ex iniuria ius non oritur”* and “*nemo auditur allegans turpitudinem suam*”. Under international law, a State enforcing its unlawful refusal acts unlawfully.

Our starting point was the crucial need for access for relief operations in favour of the victims of bloody armed conflicts. My legal arguments, as you have noted, were inspired by the wish to give a good legal basis for that access. But to be realistic, these are issues which will rarely lead to a binding court decision clarifying the law. In this situation, the law is first of all a tool which can be used to strengthen the demand for access. It is then a question of negotiating tactics whether or not to use it. But beyond these negotiations between the actors immediately concerned, it is important that the international community at large internalizes and supports this legal position strengthening the humanitarian goal of keeping access in favour of victims of armed conflicts open.

I thank you for the opportunity to plead for this goal.