

Israel – Hamas 2023 Symposium – The Obligation to Allow and Facilitate Humanitarian Relief

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by [Ori Pomson](#) | Nov 7, 2023



Much has been written and said over the past few weeks on obligations relating to humanitarian supplies in the context of the Gaza conflict. Certain authors went straight to questions of the prohibition on (intentionally) starving the civilian population (e.g. [here](#) and [here](#)), while others have considered issues relating siege warfare. Yet relatively little has been discussed regarding the obligation under international humanitarian law (IHL) to allow and facilitate the provision of humanitarian relief.

Obligations to allow and facilitate the provision of humanitarian relief are reflected in [Article 23](#) of the Fourth Geneva Convention (GC IV), [Article 70](#) of the First Additional Protocol to the Geneva Conventions (AP I) and [Article 18\(2\)](#) of the Second Additional Protocol to the Geneva Conventions (AP II). It is generally considered that these provisions reflect customary international law (but see U.S. [Department of Defense Law of War Manual](#), § 5.19.3). However, it is not entirely clear whether each and every detail provided in Article 70 AP I indeed reflects customary international law (see Michael J. Matheson's [observations](#); and [cautious language](#) of Israel in the *Al-Bassiouni* case).

The purpose of this post is to consider in greater detail certain pertinent aspects of the obligation to allow and facilitate humanitarian relief. It seeks to answer three questions. First, is there an obligation to actively provide the enemy's civilian population with humanitarian relief? Second, when does the obligation to allow and facilitate the provision of humanitarian relief arise? Third, what are the exceptions, if any, to this obligation? There are many additional pertinent issues regarding the obligation to allow and facilitate humanitarian relief, such as the (often overlooked) issue of technical arrangements which may be imposed to ensure proper screening and distribution of humanitarian relief. However, for reasons of space, I shall not consider such issues.

An Obligation to Actively Provide Humanitarian Relief?

Shortly after the October 7 massacre, Israel announced that it would stop providing various supplies to the Gaza Strip, including water, food, electricity, and fuel, though it has since returned to providing water. Certain critiques of Israel's approach to humanitarian relief were written in the backdrop of this statement.

Under IHL, an obligation to actively provide humanitarian relief only arises for an occupying power regarding the population in the territory which is under its belligerent occupation. I have argued elsewhere that the suggestion that the Gaza Strip is under Israel's occupation is untenable; it is beyond the scope of the present post to repeat these arguments. Nevertheless, on this premise, Israel has no obligation to provide the Gaza Strip with resources. This is not "collective punishment," but rather the (bleak) reality of armed conflict, in which economic measures are consistently taken against the enemy party.

When does the Obligation Arise?

First and foremost, it would seem that the party controlling the territory has the obligation to provide for the humanitarian needs of the civilian population under its control. Thus, it is for Hamas to provide humanitarian resources to the Gazan civilian population. Yet, if the territorial authorities are not seeing to the humanitarian needs of its population, the question arises when an obligation to allow and facilitate humanitarian relief applies.

Article 70(1) of AP I provides,

If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided [*insuffisamment approvisionnée*] with the supplies mentioned in Article 69 [*i.e.* "clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population . . . and objects necessary for religious worship"], relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions.

Similarly, Article 18(2) of AP II provides that the obligation relating to relief actions arises where “the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies.” Note that there are arguably differences between the law applicable to allowing and facilitating humanitarian aid in international armed conflicts and non-international armed conflicts—many consider the conflict in Gaza to fall into the latter category—although the differences are not significant for the purposes of the present discussion.

It seems the phrase “not adequately provided” in Article 70 was left intentionally ambiguous, particularly as to the question how the existence, or absence, of adequate provisions is measured. It also seems Article 18(2) of AP II was left equally—if not more—ambiguous on this question. However, at least for the purposes of customary international law—the applicable law in the present conflict—the question of adequate provision seems to depend on the ability of the authorities of the territory to provide essential supplies for its civilian population.

First, an initial International Committee of the Red Cross (ICRC) draft text for AP I, published in 1972, explicitly provided that obligations regarding humanitarian relief would arise where “domestic resources are inadequate;” this condition appears to have elicited little controversy. The ICRC did omit this stipulation from its 1973 draft, which served as the basis for the Diplomatic Conference in 1974-1977, but it seems it was omitted on the assumption it was superfluous.

Second, the negotiating parties in the Diplomatic Conference seemed to have been working under the assumption that it was for the party controlling the territory to first see to the needs of the population under its control. However, it should be added that save for the Norwegian Manual on the Law of Armed Conflict—which also appears to work under this assumption—military manuals are silent on the question of determining when the civilian population lacks supplies essential for its survival.

It should also be noted that the ICRC 1987 *Commentary* on AP II stipulates that “[s]uch external aid is complementary; it is only provided when the responsible authorities can no longer meet the basic necessities of the civilian population whose survival is in jeopardy.” However, considering the *Commentary* is at best a “subsidiary means for the determination of rules of law,” the ICRC’s statement cannot be considered dispositive.

Are there Exceptions to the Obligation?

Both Article 70 of AP I and Article 18(2) of AP II, as well as customary international law, subject the obligation to allow and facilitate the provision of essential humanitarian relief to the “agreement” or “consent” of the parties concerned. It seems uncontroversial that the refusal of such consent may not be arbitrary or unreasonable (see also the German Manual

on the Law of Armed Conflict, which refers to “objective” reasons for refusal). What, then, would be a reasonable refusal of consent under the Additional Protocols and customary international law?

The United Kingdom Manual on the Law of Armed Conflict, in considering valid bases for refusing to allow or facilitate humanitarian relief applicable to its obligations under Article 70 of AP I, essentially imports the exceptions to the (more limited) obligation to allow and facilitate humanitarian aid enshrined in Article 23(2) of GC IV. The latter stipulates,

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

(a) that the consignments may be diverted from their destination,

(b) that the control may not be effective, or

(c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

Given that these exceptions were the subject of careful and considered negotiations, it appears that their imposition as conditions for consent to allowing and facilitating humanitarian relief is neither arbitrary nor unreasonable. In other words, even for parties to AP I, it is permissible to refuse consent to the provision of humanitarian relief if any of the exceptions listed in Article 23(2) of GC IV apply.

It is true that Bothe, Partsch & Solf were of the opinion that AP I extinguished the applicability of the Article 23(2) exceptions, seemingly due to their absence in the AP I framework. Yet, the learned trio did not consider these exceptions in light of the discretion AP I grants to States in agreeing to humanitarian relief operations. Given the more general discretion recognised in AP I, it would seem unnecessary to (re-)list the valid grounds for refusing consent.

On the substance of the exceptions themselves, exception (a) is self-explanatory. This exception is highly relevant to the present conflict in which there have been reports that Hamas has seized humanitarian supplies. Exception (b) also seems to be concerned with instances where there are serious fears that the provision of relief will not reach its destination.

Exception (c) appears to be most pertinent in instances where the authorities of the territory are hoarding supplies for its military purposes. As the United States explained during the drafting of GC IV, elaborating upon the reasoning behind the drafting of the conditions,

exception (c) corresponds to the fear that “there would be such indirect diversion by the substitution of supplies to the war effort of the government receiving the supplies.” Accordingly, exception (c) permits a State to impede humanitarian relief where such relief would allow the enemy to maintain its supplies for its own war efforts instead of sharing such supplies with its civilian population. Given the reports that Hamas is hoarding fuel reserves to maintain its military infrastructure and operations, which could otherwise be shared with facilities such as hospitals and desalination plants, exception (c) would seem applicable in the present circumstances.

Conclusion

There are three main takeaways that arise from this post. First, there is no obligation upon the warring parties to an armed conflict to actively provide humanitarian relief to the civilian population under the control of the other party in an armed conflict.

Second, at least under customary international law, the inadequacy of supplies necessary for the survival of the civilian population—which brings into play the passive obligation to allow and facilitate humanitarian relief—seems to arise only when the authorities controlling the territory do not have the capacity to provide such relief.

Third, there are significant exceptions to the obligation to allow and facilitate the provision of humanitarian relief under the Additional Protocols and customary international law. In particular, an exception arises when there are serious reasons to believe the relief may be diverted to the enemy’s military efforts. An exception also arises where the relief would allow the enemy to maintain its supplies for its own war efforts instead of sharing such supplies with its civilian population.

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